CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 32 DECEMBER 16, 1998 NO. 50

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 98–89)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR NOVEMBER 1998

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): November 11, and November 26, 1998.

Greece drachma:

November 1, 1998	$0.003549
November 2, 1998	.003575
November 3, 1998	.003577
November 4, 1998	.003568
November 5, 1998	.003601
November 6, 1998	.003588
November 7, 1998	.003588
November 8, 1998	.003588
November 9, 1998	.003521
November 10, 1998	.003521
November 11, 1998	.003521
November 12, 1998	.003520
November 13, 1998	.003521
November 14, 1998	.003521
November 15, 1998	.003521
November 16, 1998	.003561
November 17, 1998	.003565
November 18, 1998	.003564
November 19, 1998	.003545
November 20, 1998	.003530
November 21, 1998	.003530
November 22, 1998	.003530
November 23, 1998	.003493
November 24, 1998	.003490
November 25, 1998	.003498
November 26, 1998	.003498
November 27, 1998	.003478
November 28, 1998	.003478
November 29, 1998	.003478
November 30, 1998	.003514

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for November 1998 (continued):

South Korea won:

November 1, 1998	$0.000757
November 2, 1998	.000758
November 3, 1998	.000760
November 4, 1998	.000762
November 5, 1998	.000759
November 6, 1998	.000762
November 7, 1998	.000762
November 8, 1998	.000762
November 9, 1998	.000760
November 10, 1998	.000759
November 11, 1998	.000759
November 12, 1998	.000759
November 13, 1998	.000758
November 14, 1998	.000758
November 15, 1998	.000758
November 16, 1998	.000759
November 17, 1998	.000769
November 18, 1998	.000769
November 19, 1998	.000774
November 20, 1998	.000789
November 21, 1998	.000789
November 22, 1998	.000789
November 23, 1998	.000801
November 24, 1998	.000794
November 25, 1998	.000797
November 26, 1998	.000797
November 27, 1998	.000801
November 28, 1998	.000801
November 29, 1998	.000801
November 30, 1998	.000802

Taiwan N.T. dollar:

November 1, 1998	$0.030788
November 2, 1998	.030817
November 3, 1998	.030760
November 4, 1998	.030741
November 5, 1998	.030675
November 6, 1998	.030628
November 7, 1998	.030628
November 8, 1998	.030628
November 9, 1998	.030600
November 10, 1998	.030441
November 11, 1998	.030441
November 12, 1998	.030534
November 13, 1998	.030553
November 14, 1998	.030553
November 15, 1998	.030553
November 16, 1998	.030675
November 17, 1998	.030722
November 18, 1998	.030628
November 19, 1998	.030675
November 20, 1998	.030628
November 21, 1998	.030628
November 22, 1998	.030628
November 23, 1998	.030769
November 24, 1998	.030722

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for November 1998 (continued):

Taiwan N.T. dollar (continued):

November 25, 1998	$0.030722
November 26, 1998	.030722
November 27, 1998	.030722
November 28, 1998	.030722
November 29, 1998	.030722
November 30, 1998	.030769

Dated: December 1, 1998.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

(T.D. 98–90)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR NOVEMBER 1998

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 98–84 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): November 11, and November 26, 1998.

Australia dollar:

November 4, 1998	$0.628600
November 5, 1998	.632000
November 6, 1998	.634000
November 7, 1998	.634000
November 8, 1998	.634000
November 9, 1998	.634800
November 12, 1998	.632000
November 13, 1998	.639200
November 14, 1998	.639200
November 15, 1998	.639200
November 16, 1998	.638500
November 17, 1998	.634300
November 18, 1998	.645700
November 19, 1998	.643700
November 20, 1998	.643600
November 21, 1998	.643600
November 22, 1998	.643600

FOREIGN CURRENCIES—Variances from quarterly rates for November 1998 (Continued):

Australia Dollar (Continued):

November 23, 1998	$0.641000
November 24, 1998	.641700
November 25, 1998	.640000
November 26, 1998	.640000
November 27, 1998	.633900
November 28, 1998	.633900
November 29, 1998	.633900
November 30, 1998	.628000

Japan Yen:

November 1, 1998	$0.008587
November 2, 1998	.008732
November 3, 1998	.008658
November 4, 1998	.008580
November 5, 1998	.008514
November 6, 1998	.008422
November 7, 1998	.008422
November 8, 1998	.008422
November 9, 1998	.008198
November 10, 1998	.008138
November 11, 1998	.008138
November 12, 1998	.008145
November 13, 1998	.008151
November 14, 1998	.008151
November 15, 1998	.008151
November 16, 1998	.008354
November 17, 1998	.008244
November 18, 1998	.008235
November 19, 1998	.008358
November 20, 1998	.008311
November 21, 1998	.008311
November 22, 1998	.008311
November 23, 1998	.008269
November 24, 1998	.008275
November 25, 1998	.008210
November 26, 1998	.008210
November 27, 1998	.008114
November 28, 1998	.008114
November 29, 1998	.008114
November 30, 1998	.008116

New Zealand Dollar:

November 1, 1998	$0.529500
November 2, 1998	.530500
November 3, 1998	.530300
November 4, 1998	.533100
November 5, 1998	.539500
November 6, 1998	.538500
November 7, 1998	.538500
November 8, 1998	.538500
November 9, 1998	.536000
November 12, 1998	.529500
November 13, 1998	.537800
November 14, 1998	.537800
November 15, 1998	.537800
November 16, 1998	.538500

FOREIGN CURRENCIES—Variances from quarterly rates for November 1998 (Continued):

New Zealand Dollar (continued):

November 17, 1998	$0.534500
November 18, 1998	.539000
November 19, 1998	.541200
November 20, 1998	.537000
November 21, 1998	.537000
November 22, 1998	.537000
November 23, 1998	.532500
November 24, 1998	.533800
November 25, 1998	.531500
November 26, 1998	.531500
November 27, 1998	.528500
November 28, 1998	.528500
November 29, 1998	.528500

South Africa, Republic Of, Rand:

November 1, 1998	$0.178571
November 2, 1998	.177305
November 3, 1998	.177809
November 4, 1998	.179131
November 5, 1998	.178891
November 6, 1998	.182149
November 7, 1998	.182149
November 8, 1998	.182149
November 9, 1998	.179051
November 10, 1998	.176835
November 11, 1998	.176835
November 12, 1998	.173611
November 13, 1998	.175439
November 14, 1998	.175439
November 15, 1998	.175439
November 16, 1998	.176491
November 17, 1998	.175778
November 18, 1998	.176211
November 19, 1998	.177384
November 20, 1998	.177936
November 21, 1998	.177936
November 22, 1998	.177936
November 23, 1998	.176445
November 24, 1998	.175439
November 25, 1998	.175901
November 26, 1998	.175901
November 27, 1998	.175131
November 28, 1998	.175131
November 29, 1998	.175131
November 30, 1998	.175593

Sri Lanka Rupee:

November 24, 1998	$0.147232

Thailand Baht (Tical):

November 1, 1998	$0.027174
November 2, 1998	.027248
November 3, 1998	.027233
November 4, 1998	.027322
November 5, 1998	.027457
November 6, 1998	.027211

FOREIGN CURRENCIES—Variances from quarterly rates for November 1998 (Continued):

Thailand Baht (Tical):

November 7, 1998	$0.027211
November 8, 1998	.027211
November 9, 1998	.027064
November 10, 1998	.026882
November 11, 1998	.026882
November 12, 1998	.027064
November 13, 1998	.027100
November 14, 1998	.027100
November 15, 1998	.027100
November 16, 1998	.027337
November 17, 1998	.027367
November 18, 1998	.027586
November 19, 1998	.027548
November 20, 1998	.027624
November 21, 1998	.027624
November 22, 1998	.027624
November 23, 1998	.027510
November 24, 1998	.027624
November 25, 1998	.027663
November 26, 1998	.027663
November 27, 1998	.027701
November 28, 1998	.027701
November 29, 1998	.027701
November 30, 1998	.027663

Dated: December 1, 1998.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

DENIAL OF DOMESTIC INTERESTED PARTY PETITION; PETITIONER'S DESIRE TO CONTEST DECISION CONCERNING TARIFF CLASSIFICATION OF TEXTILE COSTUMES

AGENCY: Customs Service, Department of the Treasury.

ACTION: Notice of petitioner's desire to contest decision on domestic interested party petition.

SUMMARY: In July 1997 a petition was filed by a domestic manufacturer of textile costumes regarding the tariff classification of imported textile costumes. The petition was filed pursuant to section 516, Tariff Act of 1930, as amended, seeking to have all textile costumes classified as wearing apparel in chapters 61 and 62 of the Harmonized Tariff Schedule of the United States (HTSUS).

On July 22, 1998, Customs denied the Domestic Interested Party Petition and affirmed that the four textile costumes in question were classified as festive articles in subheading 9505.90.6090 (now 9505.90.6000), HTSUS, because they were found to be flimsy, nondurable, and not normal articles of wearing apparel. Pursuant to 19 CFR 175.24, Customs is now providing notice of this decision and also providing notice of the receipt of petitioner's desire to contest this decision.

DATE: December 4, 1998.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Textiles Branch (202–927–1009).

SUPPLEMENTARY INFORMATION:

Background

Classification of Costumes

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRIs taken in order.

The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRIs.

Heading 9505, HTSUS, includes articles which are for "Festive, carnival, or other entertainment." However, Note 1(e), chapter 95, HTSUS, excludes articles of "fancy dress, of textiles, of chapter 61 or 62" from chapter 95. The ENs to 9505, state, among other things, that the heading covers:

(A) **Festive, carnival or other entertainment articles,** which in view of their intended use are generally made of non-durable material. They include:

* * * * * * *

(3) Articles of fancy dress, e.g., masks, false ears and noses, wigs, false beards and moustaches (**not being** articles of postiche-**heading 67.04**), and paper hats. However, the heading **excludes** fancy dress of textile materials, of **chapter 61** or **62**.

On November 15, 1994, Customs issued HQ 957318, stating that it had determined to classify as festive articles in subheading 9505.90.6090, HTSUS, costumes of a flimsy nature and construction, lacking in durability, and generally recognized as not being normal articles of apparel.

FILING OF DOMESTIC INTERESTED PARTY PETITION

On June 2, 1997, in response to the domestic manufacturer's request, Customs issued a decision, Headquarters Ruling (HQ) 959545, determining that four costume sets and their accessories would be classified under subheading 9505.90.6090, HTSUS, which provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other: Other" (effective August 1, 1997, the provision was amended and now reads as follows: 9505.90.6000, HTSUS, "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other," which provides for duty-free entry under the general column one rate of duty).

In July 1997, and in accordance with the procedures of 19 U.S.C. 1516, and 19 CFR Part 175, a domestic interested party petition was filed on behalf of an American manufacturer of textile costumes. The petitioner contends that virtually identical costumes to those manufactured by petitioner are being imported into the United States and some of these textile costumes are being erroneously classified by Customs under subheading 9505.90.6090, HTSUS, as "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other: Other." The provision is duty free under the general column one rate. The petitioner claims that all imported textile costumes should be classified as wearing apparel in chapters 61 or 62, HTSUS, and are therefore dutiable and

may be subject to quota and visa restraints. Petitioner asserts that all textile costumes are excluded from classification under subheading 9505.90.6090, HTSUS, pursuant to Note 1(e), Chapter 95.

Notice of the domestic interested party petition was published in the Federal Register on December 22, 1997 (62 FR 66891). The notice invited written comments on the petition from interested parties. The comment period closed on February 20, 1998, and Customs received 767 comments.

Of the comments received against Customs position, 128 followed a form letter where the individual identified herself or himself as a member of the domestic costume industry. There were 625 comments submitted by individuals on various form letters. The comments received in support of Customs position were submitted on behalf of several trade associations and various U.S. importers of Halloween costumes, non-seasonal dress-up sets, toys, gifts, housewares, or novelties.

DECISION ON PETITION AND NOTICE OF PETITIONER'S DESIRE TO CONTEST

In HQ 961447, dated July 22, 1998, Customs denied the Domestic Interested Party Petition and affirmed the classification determinations set forth in HQ 959545, dated June 2, 1997, in which four textile costumes were classified as festive articles in subheading 9505.90.6090 (now 9505.90.6000), HTSUS, because they were found to be flimsy, nondurable, and not normal articles of wearing apparel. HQ 961447 rejected the arguments contained in the 516 Petition that all imported costumes made of textiles should be classified under Chapters 61 and 62, HTSUS, as items of apparel.

In correspondence dated July 23, 1998, the domestic manufacturer filed written notice of the desire to contest Customs decision in HQ 961447. The notice to contest Customs decision also designated ports at which the merchandise is being imported into the United States and at which the petitioner desires to protest.

AUTHORITY

This notice is published in accordance with section 175.24, Customs Regulations (19 CFR 175.24), and 19 U.S.C. 1516.

DRAFTING INFORMATION

The principal author of this document was Ann Segura Minardi, Textiles Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: November 4, 1998.
DENNIS M. O'CONNELL,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, December 4, 1998 (63 FR 67170)]

RENEWAL OF THE GENERALIZED SYSTEM OF PREFERENCES

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: The Generalized System of Preferences (GSP) is a renewable preferential trade program that allows the eligible products of designated developing countries to directly enter the United States free of duty. The GSP program expired on June 30, 1998, but has been renewed, effective October 21, 1998, with retroactive effect to July 1, 1998, by a provision in the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Public Law 105–277. This document provides notice to importers that Customs will begin processing refunds on all duties paid, with interest from the date the duties were deposited, on GSP-eligible merchandise that was entered on July 1, 1998, through October 20, 1998, and that Customs will accept claims for GSP duty-free treatment for merchandise entered, or withdrawn from a warehouse, for consumption on or after October 21, 1998, through June 30, 1999, the provision's current sunset date.

DATES: Customs began the processing of refunds on duties paid—with interest as set forth in this document—on October 27, 1998.

FOR FURTHER INFORMATION CONTACT:

For general operational questions:

Formal entries—John Pierce, 202–927–1249
Informal entries—William Kotlowy, 202–927–1364
Mail entries—Robert Woods, 202–927–1236
Passenger Claims—Michael Perron, 202–927–1325

For specific questions relating to ABI processing: James Halpin, Office of Information and Technology, 202–927–7128.

Questions from filers regarding ABI transmissions should be directed to their ABI client representatives. Persons with other questions regarding this notice may contact John Pierce, Trade Agreements, 202–927–1249.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 501 of the Trade Act of 1974 (the 1974 Act), as amended (19 U.S.C. 2461), authorizes the President to establish a Generalized System of Preferences (GSP) to provide duty-free treatment for eligible articles imported directly from designated beneficiary countries. Pursuant to 19 U.S.C. 2465, as amended by section 981(a) of Public Law 105–34, 111 Stat. 902, duty-free treatment under the GSP program expired on June 30, 1998.

On October 21, 1998, the President signed into law the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999,

Public Law 105–277. Section 1011 of the "Tax and Trade Relief Extension Act of 1998" (within Division J of that Appropriations Act) provides for the extension of GSP duty-free treatment to eligible articles from designated beneficiary countries that are entered, or withdrawn from a warehouse, for consumption on or after October 21, 1998, through June 30, 1999. Section 1011 also provides for the refund of any duty paid with respect to entries made after June 30, 1998, through October 20, 1998, to which duty-free treatment would have applied, provided that a request for liquidation or reliquidation is filed with Customs by April 19, 1999, *(i.e.*, within 180 days after the date of enactment of the Appropriations Act) and contains sufficient information to enable Customs to locate the entry or to reconstruct the entry if it cannot be located.

Recognizing the impact that retroactive renewal and consequent numerous reliquidations will have on both importers and Customs, Customs developed a mechanism to facilitate refunds *(see*, Federal Register Notice of June 16, 1998, 63 FR 32911) that began the processing of refunds on October 27, 1998. Customs expects the processing of refunds to take from four to eight weeks for certain formal Automated Broker Interface (ABI) entries. If refunds are not received within the specified time, importers are advised to direct inquiries regarding the status of their refunds to the appropriate Customs port of entry.

Duty-Free Entries

Effective October 21, 1998, filers again will be entitled to file GSP-eligible entries without the payment of estimated duties.

Refunds With Interest

A. Formal Entries

Customs will liquidate or reliquidate all affected entries and refund any duties deposited for items qualifying for GSP. Field locations shall not issue GSP refunds except as instructed to do so by Customs Headquarters.

If an ABI entry was filed with payment of estimated duties using the Special Program Indicator (SPI) for the GSP (the letter "A") as a prefix to the tariff number, no further action by the filer is required; filings with the SPI "A" will be treated as conforming requests for refunds.

Non-ABI filers who either did or did not request a refund by using the SPI "A" must request a refund in writing from the Port Director at the port of entry by April 19, 1999. The letter may cover either single entries or all entries filed by an individual filer at a single port. To expedite refunds, Customs recommends the following information be included in each letter:

1. A statement requesting a refund, as provided by section 1011 of the "Tax and Trade Relief Extension Act of 1998;"
2. The entry numbers and line items for which refunds are requested; and

3. The amount requested to be refunded for each line item and the total amount owed for all entries.

Interest on duties deposited will be paid, pursuant to section 505 of the Tariff Act of 1930, as amended (19 U.S.C. 1505), based on the quarterly Internal Revenue Service interest rates used to calculate interest on refunds of Customs duties as follows:

July 1, 1998—July 31, 1998	7%
August 1, 1998—August 31, 1998	7%
September 1, 1998—September 30, 1998	7%
October 1, 1998—October 20, 1998	7%

B. Informal Entries

Refunds with interest on informal entries filed via ABI on a Customs Form 7501 with the SPI "A" will be processed in accordance with the procedures discussed above.

C. Mail Entries

The addressees must request a refund of GSP duties and return it, along with a copy of the CF 3419A, to the appropriate International Mail Branch (address listed on bottom right hand corner of CF 3419A). It is essential that a copy of the CF 3419A be included as this will be the only means of identifying whether GSP products have been entered and estimated duties and fees have been paid.

D. Baggage Declarations and Non-ABI Informal Refunds

If travelers/importers wrote a statement directly on their Customs declarations (CF 6059B) or informal entries (CF 363 or CF 7501) requesting a refund, no further action by the traveler/importer will be required; the statement will be treated as a conforming request for refunds. Failing to request a refund in this manner will not preclude a traveler/importer from otherwise making a timely request in writing, as described above for non-ABI filers.

Dated: November 24, 1998.

PETER J. BAISH,
Acting Assistant Commissioner,
Field Operations.

[Published in the Federal Register, December 4, 1998 (63 FR 67169)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, December 2, 1998.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF ELASTIC BUNGEE STRAP

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to Section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat 2057), this notice advises interested parties that Customs is revoking New York Ruling Letter (NY) C86384, dated April 14, 1998, concerning a ruling pertaining to the tariff classification of an elastic strap consisting of a rubber core material with a man-made fiber textile material.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after February 15, 1999.

FOR FURTHER INFORMATION CONTACT: Phil Robins, Textiles Classification Branch (202) 927–2380.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 28, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 43, proposing to revoke New York Ruling Letter (NY) C86384, dated April 14, 1998, concerning the classification of an elastic strap from China or Korea. Comments were requested on the correctness of the revocation. No comments were received.

In NY C86384, an elastic strap, consisting of a rubber core and covered with a man-made fiber textile material, was classified under sub-

heading 5609.00.3000 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) based on classification as a rubber cord made of threads. This ruling was based on Customs belief that the cords were classified according to their textile components.

It is now Customs position that the rubber imparts the essential character to the elastic strap and, therefore, Customs intends to revoke NY Ruling C86384 to reflect the proper classification of the cordage under 5609.00.4000, HTSUSA. The purpose of these straps is to secure tarpaulins and it is the rubber that allows the cord to stretch, bend and wrap around in performing such a function. Accordingly, the elastic straps should be classifiable under subheading 5609.00.4000, which provides for cordage of "other materials."

Headquarters Ruling (HQ) 962070 revoking NY C86384 is set forth as the "Attachment" to this document.

Pursuant to Section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the importation of elastic straps consisting of a rubber core material with a man-made fiber textile cover.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: December 1, 1998.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, December 1, 1998.

CLA–2 RR:CR:TE 962070 MBG
Category: Classification
Tariff No. 5609.00.4000

MR. RALPH NATALE
AMERICAN SHIPPING COMPANY, INC.
140 Sylvan Avenue
Englewood Cliffs, NJ 07632

Re: The tariff classification of an elastic strap from China or Korea; Revocation of NY Ruling C86384.

DEAR MR. NATALE:

On April 14, 1998, Customs issued New York Ruling Letter (NY) C86384 to your company on behalf of Strong Man Building Products, Corp., regarding the tariff classification of

an elastic strap consisting of a rubber core covered with a man-made textile material from either China or Korea. The cords were classified under subheading 5609.00.3000 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Our New York office asked us to revoke that ruling to reflect classification of the cords under subheading 5609.00.4000, HTSUSA.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY C86384 was published on October 28, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 43.

Facts:

The merchandise under reconsideration is an elastic strap which is used to secure tarpaulins. It consists of a length of rubber core material covered with a man made textile material. On one end of the strap is a small plastic hook. The other end is stapled to a short (two inch) length of hard plastic. The entire strap measures ten inches in length.

Issue:

Whether the strap is classifiable as cordage of man made fibers (i. e., nylon) under subheading 5609.00.3000, or as cordage of other materials (i. e. rubber) under subheading 5609.00.4000?

Law and Analysis:

Classification of goods under HTSUSA is governed by the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Heading 5609 covers "Articles of yarn, strip or the like of heading 5404 or 5405, twine, cordage, rope or cables, not elsewhere specified or included."

Note 10 Section XI states that elastic products consisting of textile materials combined with rubber threads are classified as textile products in Section XI.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN), while not legally binding, are recognized as the official interpretation of the Harmonized System at the international level. The EN to heading 5609 state that the heading includes:

> [Y]arns, cordage, rope, etc. cut to length and looped at one or both ends, or fitted with tags, rings, hooks, etc. (e.g., shoe laces, clothes lines, towing ropes) ships' fenders, unloading cushions, loading slings, dish "cloths" made of a bundle of yarns folded in two and bound together at the folded end, etc.

In this case, the elastic strap with a hook meets the perimeters set forth in the EN. Accordingly, they are classifiable under heading 5609.

At the subheading level, we must determine if the strap is classifiable according to its rubber or textile components. The cord is not classifiable solely on the basis of GRI 1, and, therefore, the remaining GRIs will be applied in the order of their appearance.

GRI 2(a) is inapplicable in this instance as it refers to incomplete or unfinished articles. GRI 2(b) states that classification of goods consisting of more than one material or substance (i.e., the rubber and textile components in this case) shall be according to the principles of GRI 3. GRI 3(a) sates that the heading which provides the more specific description is to be preferred to one that is more general. However, when two headings each refer to part only of the materials in mixed goods, as in the present case, the headings are to be regarded as equally specific. GRI 3(b) directs that the goods are to be classified as if they consisted of the material which gives them their essential character.

In this case, it is the rubber that imparts the essential character to the elastic strap. The purpose of this strap is to secure tarpaulins and it is the rubber that allows the cord to stretch, bend and wrap around in performing such a function. GRI 6 provides that classification of subheadings will use the same GRI rules. Therefore, upon determining there is not a more specific provision for the rubber component, the elastic strap is classifiable under subheading 5609.00.4000, which provides for cordage of "other materials." Classification of elastic straps in this subheading is consistent with prior Customs rulings for like products. For further analysis see Customs Headquarters Ruling Letter (HQ) 959968, dated March 31, 1997, which classified ponytail holders consisting of rubber cores wrapped in man-made textile as articles [of] other [textile material]; HQ 953297, dated March 24, 1993, and HQ 959546, dated January 27, 1997 which classified bungee cords composed of a rubber core with man made textile cover under HTSUSA 5609.00.4000.

Holding:

This ruling revokes NY C86384 and classifies the strap under subheading 5609.00.4000, HTSUSA, which provides for "Articles of yarn, strip or the like of heading 5404 or 5405, twine, cordage, rope or cables, not elsewhere specified or included: Other." It is dutiable at the general column one rate of 6.2 percent *ad valorem*.

In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF KITTY LITTER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to § 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by § 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of kitty litter consisting of 73–84 percent pulp from recovered newsprint and 16–27 percent sawdust, whether or not also containing an odor control agent and/or a fungicide, whether or not used in non-residential applications. Notice of the proposed revocation was published on October 21, 1998.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or before February 15, 1999.

FOR FURTHER INFORMATION CONTACT: Edward A. Bohannon, Senior Attorney, General Classification Branch, (202) 927–1613.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 21, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 42, proposing to revoke *NY* 855603, dated September 12, 1990, which classified kitty litter made with recycled newspaper, sawdust and various inorganic chemicals as other chemical mixtures not elsewhere provided for, in subheading 3823.90.5050, Harmonized Tariff Schedule of the United States (HTSUS). No comments were received in response to this notice.

Pursuant to § 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by § 623 of Title VI (Customs Modernization) of the North

American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking *NY* 855603 to reflect the proper classification of kitty litter consisting of 73–84 percent pulp from recovered newsprint and 16–27 percent sawdust, whether or not also containing an odor control agent and/or a fungicide, whether or not used in non-residential applications, in subheading 4823.70.0000, HTSUS, the provision for molded or pressed articles of paper pulp. *HQ* 961669 revoking *NY* 855603 is set forth as the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with § 177.10(c)(1), *Customs Regulations* (19 CFR 177.10(c)(1).

Dated: November 25, 1998.

MARVIN AMERNICK,
(for John A. Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, November 25, 1998.

CLA–2 RR:CR:GC 961669
Category: Classification
Tariff No. 4823.70.0000

MR. LEIGH A. SCHMID, M.B.A.
PARTNER,
INTERNATIONAL TRADE & CUSTOMS SERVICES
KPMG
Box 10426 777 Dunsmuir Street
Vancouver BC V7Y 1K3 Canada

Re: *NY* 855603 revoked; kitty litter and similar absorbent products.

DEAR MR. SCHMID:

In your letter of December 5, 1997, on behalf of Canbrands International, Ltd., you requested reconsideration of *NY* 855603, issued to A.N. Deringer, Inc. on September 12, 1990, by the Area Director, New York Seaport, in which kitty litter made with recycled newspaper, saw dust and various inorganic chemicals was held to be classifiable in subheading 3823.90.5050, Harmonized Tariff Schedule of the United States (HTSUS), as a class or kind of chemical mixtures not elsewhere provided for.

Pursuant to § 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by § 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed revocation of *NY* 855603 was published on October 21, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 42. No comments were received in response to that notice.

Facts:

Paper pulp is pelletized with other materials and substances, to be used to absorb fluids and odors. More specifically, each of four products are composed of 73 – 84 percent of pulp

derived from recovered newsprint and 16 – 27 percent sawdust; three of the products also contain an odor control agent, but one of the products also contains a fungicide, and one, used in non-residential applications, contains neither an odor control agent nor a fungicide.

Processing of all products involves mixing the materials in water and feeding them through a pellet mill to produce pellets of various lengths and diameters. Some batches may be crumbled or cut to length to provide different textures. In the end, the pellets are strained, then packaged for shipment.

Upon request, Customs issued NY 855603 in 1990, classifying the aforesaid products in subheading 3823.90.5050, HTSUSA (1990), the provision for, in part, "residual products of the chemical or allied industries, not elsewhere specified or included, other, other."

In 1997, a purchaser of one or more of the products made by your client received Binding Tariff Information from HM Customs and Excise, Tariff and Statistical Office (England), that the product would be classified under subheading 4707.30, the provision for recovered (waste and scrap) paper and paperboard; paper or paperboard made mainly of mechanical pulp (for example, newspapers, journals and similar printed matter).

The HTSUS (1998) provisions under consideration are as follows:

3824	Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included:	
3824.90	Other:	
	Other:	
3824.90.90	Other	5% 1/
3823.90.9050	Other	
or		
4707	Recovered (waste and scrap) paper or paperboard:	
4707.30.00	Paper or paperboard made mainly of mechanical pulp (for example, newspapers, journals and similar printed matter)	Free
or		
4823	Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers:	
4823.70.00	Molded or pressed articles of paper pulp	Free

Issue:

Whether a liquid absorbing and odor controlling article made of a compressed mixture of recycled mechanical pulp and sawdust, is classified as a residual product of the chemical or allied industries, as paper made mainly of recycled mechanical pulp, or as an article of molded paper pulp.

Law and Analysis:

Merchandise imported into the U.S. is classified under the HTSUSA. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUSA and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order.

GRI 2(b) provides in part that "[a]ny reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances."

It is suggested that classification of this merchandise is governed by GRI 3, particularly GRI 3(b), which states in pertinent part that when goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as if the composite goods consisted of the material or component which gives them their essential character. We do not dispute that the recycled mechanical pulp is the component, if such were the issue, that gives the products their similar essential character. We do not find, however, that GRI 3(b) controls. In order to "be in" GRI 3(b), the merchandise sought to be classified must be, ***prima facie***,

classifiable under two or more headings. Obviously, these products are not classifiable under heading 3824 as residual chemical products. We find that they are not classifiable under heading 4707, either, inasmuch as they are not "recovered paper," but *articles of* pulp from recovered paper. We believe that classification of these liquid absorbing products is controlled by GRIs 1 and 2(b).

We find, pursuant to the terms of the heading, there being no relative section or chapter notes pertaining, that kitty litter consisting of paper pulp that has been pelletized with other materials and substances, *i.e.* sawdust and, in some cases a small amount of odor masking chemical or substance, is classifiable in subheading 4823.70.0000, HTSUSA, the provision for molded or pressed articles of paper pulp.

Holding:

Under the authority of GRI 1, liquid absorbing products consisting of 73–84 percent pulp from recovered newsprint and 16–27 percent sawdust, three of which products also contain an odor control agent, one of which also contains a fungicide, and one, used in non-residential applications, containing neither an odor control agent nor a fungicide, are classifiable in subheading 4823.70.0000, HTSUSA, "Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size of shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers: molded or pressed articles of paper pulp."

Merchandise so classified may be entered free of duty in 1998.

NY 855603 is revoked. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with § 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN AMERNICK,
(for John A. Durant, Director,
Commercial Rulings Division.)

PROPOSED MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF INFLATABLE ARM BANDS AND SWIM VESTS OF VINYL

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of inflatable arm bands and swim vests of vinyl under the Harmonized Tariff Schedule of the United States (HTSUS). Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before January 15, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W. , Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Michael McManus, Office of Regulations and Rulings, General Classification Branch, (202) 927–2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of inflatable arm bands and swim vests of vinyl.

In NY 829593, issued July 25, 1988, Customs classified numerous items. Among these items were inflatable arm bands and swim vests of vinyl which were classified in subheading 3926.90.75, HTSUS, as inflatable articles of plastic, not elsewhere specified or included. NY 829593 is set forth as "Attachment A" to this document.

Upon review of this ruling, Customs has discovered an error in the classification of inflatable arm bands and swim vests of vinyl. Classification within Chapter 39, HTSUS, is appropriate only where the merchandise is not an article of Chapter 95, HTSUS. As explained in proposed Headquarters Ruling Letter (HQ) 961988, set forth as "Attachment B" to this document, this product may be classified in subheading 9506.29.0040, HTSUS, as water-sport equipment. Thus, inflatable arm bands and swim vests of vinyl are excluded from subheading 3926.90.75, HTSUS.

Customs intends to modify NY 829593 to reflect the proper classification of inflatable arm bands and swim vests of vinyl. Before taking this action, we will give consideration to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: November 25, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, July 25, 1998.

CLA–2–95:S:N:N3:224 829593, 829594, 829595, 829600, 829601, 829602, 829603, 829604, 829605, 829606, 829607, 829608, 829609, 829610, 829611, 829612, 829613, 829614, 829619, 829620, and 829621
Category: Classification
Tariff No. 9506.99.5500, 9503.90.6000, 9503.90.5000, 9503.49.0020, 3926.90.7500, 4202.92.4500, and 9506.29.0040

MR. NED H. MARSHAK
SHARRETTS, PALEY, CARTER & BLAUVELT, P.C.
Eighty Broad Street
New York, NY 10004

Re: The tariff classification of inflatables and swim gear from Taiwan.

DEAR MR. MARSHAK:

In your letters dated April 18, 1988, on behalf of your client, Intex Recreation Corp., you requested tariff classification rulings under the Harmonized Tariff Schedule of the United States (HTS), which is scheduled to replace the Tariff Schedules of the United States (TSUS) in 1988. Public notice will be given of the exact date.

The merchandise consists of vinyl inflatable pool floats and mattresses, swim rings, preschool and Juvenile novelties beach balls, pools and various swim gear, To arrive at our decision we have taken into account a product's dimensions, overall appearance, constituent materials, construction, including gauge thickness and number of air chambers, and whether the product has the character of a toy plaything or is designed for a functional, recreational use.

The products along with their applicable HTS subheading are as follows:

Intex Style No..	*Description*	*HTS Subheading*
59410	Cozy Wading Pool	9506.99.5500
59411	Jungle Pool	9506.99.5500
59420	Summerfun Pool	9506.99.5500
59421	Amoeba Print Pool	9506.99.5500
94299	Snoopy Inflatable Pool	9506.99.5500
59431	Seascape Pool	9506.99.5500
58471	Super Care 'n Share Wide Side Pool	9506.99.5500
58441	Heat Wave Giant Three-Ring Pool	9506.99.5500
58432	Whale Spray Pool	9506.99.5500
59460	Amoeba Print Pool Set	9506.99.5500

Subheading 9506.99.5500 provides for swimming pools and wading pools and parts and accessories thereof. The rate of duty will be 5.3 percent *ad valorem*.

Intex Style No.	*Description*	*HTS Subheading*
59010	16" Glossy Panel Ball	9503.90.5000
59020	20" Glossy Panel Ball	9503.90.5000
59030	24" Glossy Panel Ball	9503.90.5000
59047	20" Disney Balls	9503.90.5000
59048	20" Hanna-Barbers Balls	9503.90.5000
59070	48" Jumbo Ball	9503.90.5000

Subheading 9503.90.5000 provides for other toys; inflatable toy balls, balloons and punchballs. The rate of duty will be 6.8 percent *ad valorem*.

Intex Style No.	*Description*	*HTS Subheading*
59581	32″ Dolphin Pool Pal	9503.49.0020
58561	84″ Whale Ride-On	9503.49.0020
58562	84″ Gator Ride-On	9503.49.0020
58563	67″ x 56″ Turtle Ride-On	9503.49.0020
58568	84″ Lobster Ride-On	9503.49.0020
58560	95″ Tiger Shark Ride-On	9503.49.0020
58564	95″ Blue Whale Ride-On	9503.49.0020
58565	Giraffe Raft	9503.49.0020
59567	Disney Riders	9503.49.0020
59570	See Me Sit Pool Riders	9503.49.0020

Subheading 9503.49.0020 provides for other toys; toys representing animals or non-human creatures. The rate of duty will be 6.8 percent *ad valorem*.

Intex Style No.	*Description*	*HTS Subheading*
59230	20″ Lively Print Swim Rings	9503.90.6000
59239	20″ Hanna-Barbera Rings	9503.90.6000
59220	Animal Split Rings	9503.90.6000
59227	Disney Split Rings	9503.90.6000
59252	38″ Tire Tube	9503.90.6000
59260	30″ Good Ol' Tire Tube	9503.90.6000
59251	36″ Good 01' Tire Tube	9503.90.6000
59582	Frog Float	9503.90.6000
59571	Pool Pilots	9503.90.6000
59394	48″ Adventure Canoes	9503.90.6000
59583	36″ Spray Bopper	9503.90.6000
59380	Pool Cruisers	9503.90.6000
58312	Junior Transparent Boat	9503.90.6000
59388	Disney Jungle Cruise Pool Boat	9503.90.6000
59160	Kid Stuff Riders	9503.90.6000
59557	Disney Fun Floats	9503.90.6000
59177	Disney Rider	9503.90.6000
59573	Baby Squeakers	9503.90.6000

Subheading 9503.90.6000 provides for other toys; other toys (except models), not having a spring mechanism. The rate of duty will be 6.8 percent *ad valorem*.

Inter Style No.	*Description*	*HTS Subheading*
68201	39″ Fun Tube	3926.90.7500
68209	48″ River Rat	3926.90.7500
59572	My Baby Float	3926.90.7500
59703	Economats	3926.90.7500
59702	Care-Free Mats	3926.90.7500
59712	Deluxe Action Mats	3926.90.7500
59711	Action Mats	3926.90.7500
59713	Stars and Stripes Mats	3926.90.7500
59720	Transparent Fashion Mats	3926.90.7500
59725	Suntanner	3926.90.7500
59724	Deluxe Tanner	3926.90.7500
69701	Soft-Tone Mats	3926.90.7500
58209	72″ Fun Island	3926.90.7500
58205	84″ Fun Island	3926.90.7500
68205	84″ Sun Island	3926.90.7500
58870	Folding Lounge Chair	3926.90.7500

Inter Style No.	*Description*	*HTS Subheading*
68870	Tan-Dazzler Folding Lounge Chair	3926.90.7500
59640	Arm Bands	3926.90.7500
59650	Printed Arm Bands	3926.90.7500
59657	Disney Arm Bands	3926.90.7500
59660	Printed Swim Vest	3926.90.7500
59667	Disney Swim Vest	3926.90.7500
58201	Fun Float	3926.90.7500
58206	39" Polka Dot Float	3926.90.7500
58207	48" Polka Dot Float	3926.90.7500
58896	18-Pocket Gold Tanner	3926.90.7500
58894, 68894	18-Pocket Suntanner	3926.90.7500
58802, 68802	Golden King Kool Lounge	3926.90.7500
58898, 68898	Entertainment Center	3926.90.7500
58895, 68895	36-Pocket Suntanner	3926.90.7500
58893	Transparent French Lounge	3926.90.7500
58890	18-Pocket Fashion Lounge	3926.90.7500
59803	Pool Swing	3926.90.7500
59208, 69208	Fool Bar	3926.90.7500
68891	27-Pocket French Lounge	3926.90.7500
68892	Safari Lounge	3926.90.7500

Subheading 3926.90.7500 provides for other articles of plastic: pneumatic mattresses and other inflatable articles, not elsewhere specified or included. The rate of duty will be 4. 2 percent *ad valorem*.

Intex Style No.	*Description*	*HTS Subheading*
59677	Disney Pillow-Tote	4202.92.4500

Subheading 4202.92.4500 provides for travel, sport .and similar bags, with outer surface of plastic sheeting materials or of textiles, other. The rate of duty will be 20 percent *ad valorem*.

Intex Style No.	*Description*	*HTS Subheading*
59940	Junior Swim Set	9506.29.0040
59941	Searchers Swim Set	9506.29.0040
59942	Adventurers Swim Set	9506.29.0040
59943	Deluxe Junior Swim Set	9506.29.0040
59944	Master Class Swim Set	9506.29.0040
59945	Siliblend Swim Set	9506.29.0040

Subheading 9506.29.0040 provides for other water-sport equipment. The rate of duty will be 4.64 percent *ad valorem*.

These classifications represent the present position of the Customs Service regarding the dutiable status of the merchandise under the HTS. If there are any changes before enactment this advice may not continue to be applicable.

Articles classifiable under subheadings 9506.99.5500, 9503.90.6000, and 9503.49.0020, HTS, which are products of Taiwan, are entitled to duty free treatment under the Generalized System of Preferences (GSP) upon compliance with all applicable regulations,

This ruling is being issued under the provisions of Section 177 The Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported, If the documents are filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Acting Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 961988 MGM
Category: Classification
Tariff No. 9506.29.00

MR. NED H. MARSHAK
SHARRETS, PALEY, CARTER & BLAUVELT, P.C.
67 Broad Street
New York, NY 10004

Re: Inflatable Arm Bands and Swim Vests; Modification of NY 829593.

MR. MARSHAK:

This is in response to your letter of June 10, 1998, on behalf of your client, Intex Recreation Corp., requesting the modification of New York Ruling Letter (NY) 829593, issued to you on July 25, 1988, in which numerous items were classified under the Harmonized Tariff Schedule of the United States (HTSUS). We have reconsidered NY 829593 and now believe it is in error as to the classification of inflatable arm bands and swim vests.

Facts:

In NY 829593, Customs ruled that inflatable arm bands and swim vests of vinyl were classified in subheading 3926.90.75, HTSUS, as inflatable articles of plastic, not elsewhere specified or included.

These vinyl inflatable arm bands (identified as item numbers 59650, 59640, 59642, 58647, 58649, 58648, 58642, 58641, 58650 in Intex's "1998 Wet Set Catalog") and swim vests (item numbers 59660, 58670, 58669, 58660) are of a type worn by children as flotation devices while swimming. The inflatable arm bands range in width from 6 to 7.5 inches, and in length from 7.5 to 13 inches. The thickness of the arm bands varies from 8 gauge (0.2 millimeters) to 11 gauge (0.28 millimeters). The inflatable swim vests are 10 gauge (0.25 millimeters) and 11 gauge (0.28 millimeters) in thickness.

Issue:

Whether inflatable arm bands and swim vests of vinyl are classified as other inflatable articles of plastic or as water-sport equipment?

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The following headings are relevant to the classification of this merchandise:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.90	Other:
3926.90.75	Pneumatic mattresses and other inflatable articles, not elsewhere specified or included

* * * * * * *

9506	Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:
	Water skis, surf boards, sailboards and other water-sport equipment; parts and accessories thereof:
9506.21	Sailboards and parts and accessories thereof:
9506.29.00	Other
9506.29.0020	Water skis
9506.29.0040	Other

This matter is governed primarily by GRI 1, in that the choice in classification is between two headings. Chapter 39, HTSUS, specifically excludes "Articles of chapter 95 (for example, toys, games, sports equipment)." Note 2 (v), Ch. 39. Thus, if these articles are sports equipment of Chapter 95, they cannot be classified in Chapter 39.

Chapter 95 covers "toys of all kinds whether designed for the amusement of children or adults. It also includes equipment for indoor or outdoor games, appliances and apparatus for sports." General EN, Ch. 95. This has been construed to include flotation devices similar to the instant merchandise. *See* NY A82398, issued April 17, 1996; NY B87757, issued July 25, 1997; NY C84957, issued March 9, 1998; *See also Sports Industries, Inc. v. United States*, 65 Cust. Ct. 470, C.D. 4125 (1970) (where gloves for underwater swimming were held to be "specially designed for use in sports" under the Tariff Schedules of the United States, predecessor to the HTSUS). The flotation devices here at issue are apparati for sports and are described by heading 9506, HTSUS.

Within heading 9506, HTSUS, these goods fall within the provision for "water-sport equipment." Within this subheading, the flotation devices are "other" than "Sailboards and parts and accessories thereof." Within this residual provision, these goods are "other" than "water skis."

Holding:

Inflatable arm bands and swim vests of vinyl are classified in subheading 9506.29.0040, HTSUS.

NY 829593 is modified.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF "STICK-ON EARRINGS" AND "STICK-ON EARRINGS" SETS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of articles described as "Stick-On Earrings" and "Stick-On Earrings" sets under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of a proposed modification of New York Ruling Letter (NYRL) C83853, dated February 5, 1998, was published on October 14, 1998, in Volume 32, Number 41 of the CUSTOMS BULLETIN. One comment was received in response to this notice. Based on the information contained in the comment, Customs is now revoking NYRL C83853.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after February 15, 1999.

FOR FURTHER INFORMATION CONTACT: Mary Beth McLoughlin, General Classification Branch (202) 927–2404.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 14, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 41, proposing to modify NYRL C83853 dated February 5, 1998, concerning the tariff classification of "Stick-On Earrings." One comment was received in response to this notice. Based on the information contained in the comment, Customs is now revoking NYRL C83853.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of articles identified as "Stick-On Earrings" and "Stick-On Earrings" sets with plastic imitation gemstone rings, under the HTSUS.

The "earrings" are plastic stickers printed on plastic film and come in a variety of designs, shapes and printed motifs. The stickers are pre-cut and consist of film heat sealed over a foam inner layer giving the stickers a "three-dimensional" aspect. Additionally, the stickers have an adhesive back which allows them to be peeled from a release paper. They

are displayed on a paperboard retail card resembling a calendar. The "Stick-On Earrings" and plastic imitation gemstone ring sets are displayed in 7 different groups, two earrings and one ring on a paperboard retail card resembling a weekly calendar.

In NYRL C83853 "Stick-On Earrings" which incorporated pictures and/or designs were classified in heading 3926, HTSUS. However, in Headquarters Ruling Letter (HRL) 955861 dated February 9, 1994, and HRL 954158 dated September 16, 1993, we held that, pursuant to Note 2 to section VII, HTSUS, an article identified as "Little Gems Stick-On Earrings," which consisted of plastic stickers which incorporated pictures and/or designs and were designed to decorate and adorn was classifiable under subheading 4911.91.4040, HTSUS, the provision for other printed matter. The "Stick-On Earrings" which are sold by themselves, are virtually identical to the merchandise classified in HRL 955861 and 954158. As such, they are classified under subheading 4911.91.4040, HTSUS.

Additionally, in NYRL C83853, the "Stick-On Earrings" and plastic imitation gemstone rings which were imported on a paperboard "weekly calendar" were classified separately. The submitted comment indicates that the earrings and rings are imported together on a paperboard card and sold together at retail. As they meet the requirements set forth in GRI 3(b) for "sets" they are classifiable as such under heading 7117, HTSUS, specifically subheading 7117.19.90, HTSUS, which provides for "[i]mitation jewelry: [o]ther: [o]ther: [v]alued over 20 cents per dozen pieces or parts: [o]ther: [o]f plastics."

Accordingly, Customs intends to revoke NYRL C83853 to reflect the proper classification of the "Stick-On Earrings" and "Stick-On Earrings" sets under subheading 4911.91.4040, HTSUS, and 7117.19.90, HTSUS, respectively. HRL 961400 revoking NYRL C83853 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. §1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: November 25, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, November 25, 1998.

CLA-2 RR:CR:GC 961400 MMC
Category: Classification
Tariff No. 4911.91.4040,
7117.19.90, and 7117.90.75

MR. GORDON C. ANDERSON
C.H. ROBINSON INTERNATIONAL, INC.
8100 Mitchell Road
Eden Prairie, MN 55344-2231

Re: Various "Stick-On Earrings", "Stick-On Earrings" and Plastic Imitation Gemstone Rings Sets; Metal Rings with adjustable bands; NYRL C83853 revoked.

DEAR MR. ANDERSON:

This is in reference to your February 17, 1998, letter, on behalf of Hanover Accessories, requesting reconsideration of New York Ruling Letter (NYRL) C83853 issued to you on February 5, 1998, concerning the classification of various "Stick-On Earrings", plastic imitation gemstone rings and metal rings with adjustable bands, under the Harmonized Tariff Schedule of the United States (HTSUS). Samples of the "Stick-On Earrings" and metal rings were submitted for our review.

Pursuant to section 625(c)(1) Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103-182, 107 Stat. 2057, 2186), notice of the proposed modification of NYRL C83853, was published on October 14, 1998, in the CUSTOMS BULLETIN. One comment was received in response to this notice.

In preparing this ruling we have considered the arguments presented in our April 2, 1998, meeting, as well as those submitted in your October 22, 1998, comment. Based on the information contained in the comment, Customs is now revoking NYRL C83853.

Facts:

The first two articles are identified as Item #636002 and Item #648010. They consist of 30 pairs of "Stick-On Earrings" with a variety of designs, shapes and printed motifs. The "earrings" are plastic stickers printed on plastic film. The stickers are pre-cut and consist of film heat sealed over a foam inner layer giving the stickers a "three-dimensional" aspect. Additionally, they have an adhesive back which allows the stickers to be peeled from a release paper. They are displayed on a paperboard retail card resembling a calendar. The approximate FOB unit cost is 20 cents.

Item #110/306 consists of 15 pairs of "Snowden" stick-on earrings all displaying a variety of designs and shapes in a Christmas motif. They are displayed on a paperboard retail card with a Christmas design. The approximate FOB unit price per card is 37 cents or 1.2 cents for each earring.

Item #648106 consists of seven pairs of "Stick-On Earrings" and seven matching plastic imitation gemstone rings. The earrings and rings are displayed on a paperboard retail card resembling a weekly calendar, two earrings and a ring to be worn each day. The approximate FOB unit cost for the set is 53 cents; the rings are 6.5 cents each and the fourteen earrings total 7.5 cents.

Item #647-761consists of six assorted metal rings with adjustable bands in a heart shaped container. The container is made of pink plastic with a clear hinged cover. A form fitted white foam piece which holds the rings has been inserted into the container. A textile cord is attached to the top of the container. A paperboard header card is attached to the cord. A paper tag attached to the cord states "L.J. Kids & Co.®" and " by Hanover Accessories." A little cartoon drawn girl appears on the front, with various pieces of jewelry identified on her body. The estimated FOB unit value of the item will be either 56 cents a set (8 cents per ring and 8 cents for the heart container), or 62 cents a set (8 cents per ring and 14 cents for the heart container).

Issue:

Whether the various "Stick-On Earrings", plastic imitation gemstone rings and metal rings with adjustable bands are classifiable as imitation toy jewelry.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI's). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied. The headings and subheadings under consideration are as follows:

4911	[o]ther printed matter, including printed pictures and photographs
7117	[i]mitation jewelry
	[o]f base metal, whether or not plated with precious metal:
7117.19	[o]ther
7117.19.60	[t]oy jewelry valued not over 8 cents per piece
7117.19.90	[o]ther
7117.90	[o]ther
	[v]alued over 20 cents per dozen pieces or parts
	[o]ther
7117.90.75	[o]f plastics
9503	[o]ther toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; and parts and accessories thereof

In Headquarters Ruling Letter (HRL) 955861 dated February 9, 1994, and HRL 954158 dated September 16, 1993, we classified, respectively, an article identified as "Little Gems Stick-On Earrings" and other "Stick-On Earrings" with pictures, designs, letters, symbols, characters, etc.. In both cases, the stick-ons were comprised of film heat sealed over a foam inner layer giving the stickers a "three-dimensional" aspect and had an adhesive surface that could be attached to a wide array of surfaces in addition to the ears and skin. They came in a variety of shapes and colors and in the instances relative to this case, contained pictures, designs, letters, symbols, characters, etc. They were imported in bulk.

In both cases, we held that although the earrings may have provided some amusement, they were not *designed* for amusement, but for adornment, decoration, and ornamentation. Thus, they were not classified as other toys. Although the "Stick-On Earrings" were plastic and designed to decorate and adorn, they also incorporated pictures and/or designs. Note 2 to section VII, HTSUS, states, in pertinent part, that "plastics, rubber and articles thereof, printed with motifs, characters or pictorial representations, which are not merely incidental to the primary use of the goods, fall in chapter 49." Since the subject items were designed for decoration, it followed that any printing that they incorporated was consistent with their use as ornamental articles. Thus, we held that the motifs and pictorial representations were more than incidental to the primary use of these items, requiring classification in chapter 49, HTSUS, specifically, subheading 4911.91.4040, HTSUS, the provision for "[o]ther printed matter, including printed pictures and photographs: [o]ther: [p]ictures, designs and photographs: [p]rinted not over 20 years at time of importation: [o]ther: [o]ther, [o]ther." In this case, items #636002, #648010 and #110/316 are virtually identical in description and use. Therefore, they are also classifiable under subheading 4911.91.4040, HTSUS.

Item #648106, consists of seven pairs of "Stick-On Earrings" and seven matching plastic imitation gemstone rings. The "Stick-On Earrings" are described by heading 4911, HTSUS. Notes 9 and 11 to Chapter 71, HTSUS, state, in pertinent part, that the scope of the term "imitation jewelry" includes any small object of personal adornment (gem-set or not) such as rings, bracelets, necklaces, brooches, earrings, watch chains, fobs, pendants, etc., not incorporating pearls, precious metal or precious or semiprecious stones. As the plastic rings are listed in the Notes, they clearly fall within the scope of heading 7117. However, the question remains whether the plastic rings are classifiable as "toy" jewelry for tariff purposes.

The term "toy" is not defined in the HTSUS. In HRL 959961 dated October 30, 1997, we indicated that to be classifiable as "toy jewelry" an article must be "imitation jewelry" as defined in Notes 9(a) and 11 to Chapter 71, HTSUS, and manifest "substantial play value." Furthermore, any claim that an article has "substantial play value" must be corroborated by evidence of that article's principal use. See also HRL 961396 dated August 24, 1998.

When the classification of an article is determined with reference to its principal use, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that, in the absence of special

language or context which otherwise requires, such use is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use. In other words, the article's principal use at the time of importation determines whether it is classifiable within a particular class or kind.

While Additional U.S. Rule of Interpretation 1(a), HTSUS, provides general criteria for discerning the principal use of an article, it does not provide specific criteria for individual tariff provisions. However, Courts have provided factors, which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind. They include: general physical characteristics, the expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), *cert. denied*, 429 U.S. 979.

In HRL 959961, we classified a base metal adjustable ring identified as the "Phantom Ring." The ring was created as a promotional "tie-in" to be distributed in connection with "The Phantom" a major motion picture release by Paramount Pictures. According to the importer the ring had great nostalgic value for "baby-boomers" who were comic-book collectors in their youth. The ring was used as a promotional keepsake for moviegoers.

We determined that the subject "Phantom Ring" was not "toy jewelry" because while its general physical characteristics, adjustable band, etc. indicated its possible use as "toy jewelry", the expectation of the ultimate purchaser, the environment of sale and the manner as merchandise which defines the class all indicated the "Phantom Ring" was a promotional article or piece of memorabilia lacking sufficient "play value."

In this instance, the physical characteristics of the plastic rings are inconclusive as to the ring's classification, because both "regular" and toy imitation jewelry may have an adjustable band and plastic as a constituent material. As no sample or additional *Carborundum* information such as expectation of the ultimate purchaser, channels of trade, environment of sale or use in the same manner as toy imitation jewelry, were provided for the plastic rings, we defer to the classification provided in NYRL C83853, subheading 7117.90.75, HTSUS. We note that while, the economic practicality of using the plastic rings as general imitation jewelry may be suspect because of their 6.5 cent value, such evidence by itself, cannot alter the original classification.

Because the "Stick-On Earrings" and plastic rings are described by two different headings, they cannot be classified according to GRI 1. When goods cannot be classified by applying GRI 1, and if the headings and legal notes do not otherwise require, the remaining pertinent GRIs are applied.

GRI 3 (b) states, in pertinent part, that:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, * * * shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be consulted. The Explanatory Notes (EN), although not dispositive, are to be used to determine the proper interpretation of the HTSUS. 54 Fed. Reg. 35127, 35128 (August 23, 1989). EN X to GRI 3(b), indicates that for purposes of the GRI 3(b), the term "goods put up in sets for retail sale" means goods which:

> (a) consist of at least two different articles which are *prima facie*, classifiable in different headings * * *;
>
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
>
> (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

As previously noted, the subject goods consist of components which are *prima facie* classifiable under more than one heading. Additionally, the components are put up together to carry out the specific activity of adornment and the importer has indicated that the earrings and imitation plastic gemstone rings are displayed on a paperboard retail card resembling a weekly calendar. As such, item #648106 is considered a "set" for tariff purposes. Accordingly, we must determine whether the earrings or rings impart the essential character to the sets.

In general, essential character has been construed to mean that attribute which strongly marks or serves to distinguish what an article is; that which is indispensable to the structure, core or condition of the article. In addition, EN (VIII) to GRI 3(b), at page 4, states that the factors which help determine essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

We are of the opinion that neither the earrings or rings of the set provides an essential character. Both work together for the purpose of personal adornment. Because none of the components constitutes an essential character, GRI 3(c) must be applied.

GRI 3(c) states, "[w]hen goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration." The heading which appears last in numerical order for the "Stick-On Earrings" set is heading 7117, HTSUS, within which is subheading 7117.90.75, HTSUS, which provides for [i]mitation jewelry: [o]ther: [o]ther: [v]alued over 20 cents per dozen pieces or parts: [o]ther: [o]f plastics, which describes item # 648106.

Item #647–761, consists of six assorted metal rings with adjustable bands in a heart-shaped container. The container is made of pink plastic with a clear hinged cover which opens to a form fitted white foam fabric covered ring holder which holds the rings. A textile cord is attached to the top of the container. A paper tag attached to the cord states "L.J. Kids & Co.®" and " by Hanover Accessories. A little cartoon drawn girl appears on the front. Various pieces of jewelry are identified on her body.

As previously noted, to be classifiable as "toy jewelry" an article must be "imitation jewelry" as defined in Notes 9(a) and 11 to Chapter 71, HTSUS, and manifest "substantial play value." Furthermore, any claim that an article has "substantial play value" must be corroborated by evidence of that articles' principal use.

The physical characteristics of these rings indicate that they are designed as articles of personal adornment for girls, not principally to amuse. Their constituent metal is substantial and the gold coloring appears to be a "coating" as opposed to being merely spray painted. Based upon our own empirical evidence, it is our understanding that the article will be sold in the children's clothing section of a department store as accessories to the various outfits. Such an environment of sale leads an ultimate purchaser to believe that the articles are used for the adornment of children and not as play articles to "imitate" a grown man or women's jewelry use. Use of the jewelry for personal adornment is a use which defines the "general" imitation jewelry class, *not* the toy jewelry class. The fact that the articles adorn children *does not alter their classification*. Rather it is that the articles are used for *personal adornment*, not "play" that indicates that they belong to the "general" imitation jewelry class. While, the economic practicality of using the metal rings as general imitation jewelry may be suspect because of their 8 cent value, such evidence by itself, does not alter their classification. The metal rings are classified in subheading 7117.19.90, HTSUS.

Holding:

The applicable subheading for the stick-on earrings, items #636002, 648010, 110/316, is 4911.91.4040, HTSUS. The 1998 rate of duty is 1.9 percent *ad valorem*.

The applicable subheading for the "Stick-On Earrings" and plastic imitation gemstone rings sets, identified as item #648106, will be 7117.90.7500, HTSUS, which provides for imitation jewelry: other: other: valued over 20 cents per dozen pieces or parts: other: of plastics. The 1998 rate of duty is free.

The applicable subheading for the metal rings and heart shaped container, item #647–761, will be 7117.19.9000, HTSUS, which provides for imitation jewelry: of base metal, whether or not plated with precious metal: other: other: other. The 1998 rate of duty is 11 percent *ad valorem*.

NYRL C83853 is revoked. In accordance with 19 U.S.C. §1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10 (c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Raymond F. Burghardt

(Slip Op. 98–155)

UNITED STATES SHOE CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–11–00668

(Dated November 17, 1998)

ORDER

RESTANI, *Judge:* This order relates to the Order Establishing Claims Resolution Procedure, *U.S. Shoe Corp. v. United States*, Slip Op. 98–126, No. 94–11–00668, 1998 W.L. 544680 (Ct. Int'l Trade Aug. 28, 1998).

The court has considered the defendant's statement that for purposes of the harbor maintenance tax certification form, "authorized representative of plaintiff" does not mean plaintiffs' counsel before this court. This distinction among the use of the term "authorized representative" in various forms was not made clear at the time the forms were submitted to the court for approval, or before the court approved the Claims Resolution Procedure.

Whatever extra assurance of accuracy or accountability defendant believes it will attain from signature by an in-house agent of a plaintiff is outweighed by inconvenience to the plaintiffs. Counsel are agents and may bind their principals. They are also officers of the court.

The court finds that duly "authorized representative of plaintiff" includes counsel if so authorized.

(Slip Op. 98–156)

UNITED STATES, PLAINTIFF *v.* SPANISH FOODS, INC., LILLIAM S. MARTINEZ, FRANCISCO HERNANDEZ-PEREZ, FAUSTO DIAZ-OLIVER, REMEDIOS DIAZ-OLIVER, AND VINCENTE HERNANDEZ-PEREZ, DEFENDANTS, AND LILLIAM S. MARTINEZ, FAUSTO DIAZ-OLIVER, AND REMEDIOS DIAZ-OLIVER, THIRD-PARTY PLAINTIFFS *v.* CLAUDIO L. MARTINEZ, THIRD-PARTY DEFENDANT

Court No. 98–03–00620

[Third-Party Defendant's motion to dismiss or stay third-party complaints denied.]

(Decided November 19, 1998)

Aragon, Burlington, Weil & Crockett, P.A. *(Jeffrey B. Crockett)* for third-party defendant.

Carrol & Associates, P.A. *(Linda L. Carroll)* for third-party plaintiff, Lilliam S. Martinez.

Collier, Shannon, Rill & Scott, P.L.L.C. *(Paul C. Rosenthal, Laurence J. Lasoff, and John B. Brew)* for third-party plaintiff Remedios Diaz-Oliver.

Fotopulos & Spridgeon *(Thomas E. Fotopulos)* for third-party plaintiff Fausto Diaz-Oliver.

OPINION

WATSON, *Senior Judge*: The Court has before it third-party defendant's motion to dismiss or to stay further proceedings on the third-party complaints in this civil penalty action, which action was originally brought by the government under 19 U.S.C. § 1592. This action is related to a criminal case brought by the government in the Southern District of Florida (97–0842). The movant (third-party defendant in this action) is also a defendant and alleged co-conspirator in the criminal case. He has entered into an agreement to plead guilty to one count of the indictment and to testify in the criminal trial against the other defendants (who are defendants and third-party plaintiffs in this civil action).

In other words, the government is pursuing two actions arising from alleged fraudulent import invoices. One is a criminal action begun in November of 1997 against a group of named defendants in which one of the defendants has entered into a plea agreement to cooperate against the others. That case is set for trial in May of 1999. The other action is this civil penalty action, begun in March of 1998, in which the government has not sued the cooperating criminal defendant. Now, that defendant has been impleaded by the defendants in this civil action on claims of fraud, indemnification, contribution and breach of fiduciary duty.

This is a matter of first impression in this court, although it is not uncommon elsewhere. See, Milton Pollock, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201 (1989).

For reasons which will be made clear, the third-party defendant's motion to dismiss or to stay the proceedings on the third-party complaint will be denied.

In support of the motion to dismiss, the third-party defendant argues that this civil action is parallel to the criminal proceeding and third-party plaintiffs will be estopped from claiming indemnification from third-party defendant if they are convicted of criminal fraud.

Assuming, without deciding, that defendants/third-party plaintiffs would have no action here against third-party defendant if they are convicted of criminal fraud, that is a future contingency. It does not affect the present viability of their third-party action.

At present, defendants are presumed to be innocent in the criminal action and there is no reason why they should not have the normal right of a defendant in a civil action to make a third-party claim against any party claimed to bear responsibility, in whole or in part, for the relief sought in the main action. In other words, in this civil action there is no impediment to a claim by defendants against a third-party within the jurisdiction granted this Court in 28 U.S.C. § 1583 and the rules of third-party practice set out in U.S.C.I.T. Rule 14.

Third-party defendant has failed to provide any authority for the novel proposition that, simply because there is a parallel criminal proceeding, defendants in a civil fraud action cannot make a claim for fraud, indemnification, contribution or breach of fiduciary duty against a third-party who may be liable for all or part of the penalty. Dismissal of the third-party complaints is therefore out of the question.

As for the motion for a stay, it does not meet the criteria typically found in cases in which stays are advisable. Normally, when a civil and criminal case are running parallel, there are two general circumstances that may justify a stay of the civil action. In one, the danger that discovery in the civil action poses to the self-incrimination protection of the accused in the criminal case may sometimes justify a stay of a civil action against the accused. *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1377 (D.C. Cir. 1980) cert. denied, 449 U.S. 993 (1980). No such danger exists here because the stay is sought by a party who no longer faces criminal jeopardy due to his agreement to plead guilty and testify against others. In this respect the rationale for a stay is clearly lacking. *Arden Way Associates v. Boesky*, 660 F. Supp. 1494 (S.D.N.Y. 1987).

The other circumstance in which stays are sometimes granted is when the government seeks to stay a civil action so that civil discovery disclosures will not jeopardize the prosecution of a related criminal case. *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962). There has been no showing that this situation belongs in that category. In fact, it appears that the focus of discovery here will be to find support for a statute of limitations defense to the civil penalty case, i.e., a defense that the government should have known of the fraud on a date earlier than the date used to calculate the statute of limitations for this civil action.

Since this action for a civil penalty was assertedly filed two days before the limit, the statute of limitations issue may be dispositive. In any event, the civil statute of limitations issue does not appear to have any bearing on the criminal action.

In short, the continuation of this action by answer to the third-party complaints and related discovery has not been shown to represent any threat of a type sufficient to justify a stay, either to the rights of anyone involved in the related criminal case or to the prosecution of that related case.

For the reasons given above the motion to dismiss or stay the third-party complaint in this action is denied.

(Slip Op. 98–157)

BRIDALANE FASHIONS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 98–07–02459

[Motion to dismiss denied.]

(Dated November 23, 1998)

Sullivan & Lynch, P.C. (Herbert J. Lynch) for plaintiff.

Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Amy M. Rubin*), *Michael D. Bunker*, Office of Associate Chief Counsel, United States Customs Service, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court on defendant's motion to dismiss for lack of jurisdiction. It involves the very unsettled legal landscape with regard to jurisdiction over suits by importers to recover or avoid Customs duties or penalties based on 19 U.S.C. § 1592 (1994).

FACTS

Plaintiff Bridalane is a Canadian corporation located in Montreal, Quebec, Canada. Between September 28, 1993 and October 29, 1996, Bridalane imported 862 entries of wedding gowns into the United States (the "imported merchandise") that had been manufactured in the Far East. *Pl.'s Br.*, at 1. The imported merchandise entered the United States either at the Port of Champlain, New York (835 entries), or at Louisville, Kentucky (27 entries). *Compl.*, Ex. C at 2 (Pre-penalty notice). Because these importations were processed by Bridalane's customs brokers, the brokers are listed as the importers of record on the entries and Bridalane is listed as the ultimate consignee. *See Compl.*, Ex. A at 5. At the time of the importations, the imported merchandise was incorrectly designated as a product of Canada and entered at reduced duty rates under the United States/Canada Free Trade Agreement ("CFTA") or the North American Free Trade Agreement ("NAFTA"). In addition, the merchandise was improperly marked to indicate the country of origin as Canada rather than China, Taiwan, or

Thailand. *Compl.*, Ex. A at 5. As a result of the improper marking, the United States asserts Bridalane became liable, under 19 U.S.C.A. § 1304(h)(West Supp. 1998), for marking duties in the amount of 10 percent of the value of the merchandise.

By letter dated October 28, 1996, Bridalane, through its attorney, informed Customs that "errors [were] made by [Bridalane] in importing and causing to be imported merchandise at the Port of Champlain, New York." *Compl.*, Ex. A at 1. In its letter, Bridalane stated:

> Upon review of its import records and consultation with Counsel, Bridalane determined that merchandise exported to the United States from Canada was incorrectly declared to be originating goods pursuant to NAFTA and CFTA. Further, pursuant to the Customs Rules of Origin, the subject wedding gowns are considered for Customs purposes to be country of origin China, Taiwan or Thailand depending upon the circumstances. Textile Declarations executed by Bridalane incorrectly stated that the merchandise was of Canadian origin. As a result of the aforementioned, duty was incorrectly paid under the NAFTA or CFTA special duty rates; and Textile Visas as required by the Bilateral Trade in Textiles Agreement which the United States has with the country(s) of origin; were not filed with the Customs Service at the time of entry.

Id. at 2.

Bridalane requested that Customs consider its October 28 letter a prior disclosure, as provided under 19 C.F.R. Parts 162 and 171 (1998). *Id.* at 3. Also, Bridalane stated that, whether or not agreement could be reached on the amount of duties owing as a result of the disclosed violations, it would "tender the amount calculated by the Port Director and utilize the administrative remedies of Part 174 of the Customs Regulations for relief." *Id.*

On June 18, 1997, Customs issued a pre-penalty notice advising Bridalane that it was contemplating the issuance of a penalty in an amount up to $229,444.60 (two times the loss of revenue), pursuant to 19 U.S.C. § 1592, based upon the above-described violations. *Compl.*, Ex. C at 2. In this pre-penalty notice, Customs informed Bridalane of Customs' calculation of the loss of revenue resulting from Bridalane's violations of Section 1592(a):

Regular Customs Duties	$ 31,339.24
Merchandise Processing Fees (MPF)	20,655.96
Marking Duties	62,727.10
TOTAL	$114,722.30

Id. at 3.

Of the $114,722.30 "loss of revenue" demanded by the Customs Service, plaintiff alleges only $601.61 in Customs duties and $1,400.90 in disputed marking duties relate to consumption entries which benefited from the preferential duty rate provided for in the CFTA and that the remainder relate to NAFTA. *Pl.'s Br.*, at 5.

Customs also informed Bridalane that, if all unpaid duties and fees were tendered to Customs within 30 days (*see* 19 C.F.R.

162.74(h)(1998)), Bridalane's October 28, 1996 letter would be considered a valid prior disclosure, in which case the proposed penalty amount would be amended to reflect a penalty limited to the amount of the interest due on the actual loss of revenue. *Compl.*, Ex. C at 3; *see* 19 U.S.C. § 1592(c) and 19 C.F.R. part 171, App. B. In response to Customs' June 18, 1997 letter, Bridalane tendered to Customs the regular Customs duties and the MPF in the amount of $51,995.20, but questioned the applicability of marking duties in a prior disclosure case in light of the then-pending action in *Pentax Corp. v. Robison*, 125 F.3d 1457 (Fed. Cir. 1997), *amended on reh'g, in part*, 135 F.3d 760 (Fed. Cir. 1998). *Compl.*, Ex. D at 2. Bridalane contended that a decision in *Pentax* would "be dispositive as to the appropriateness of the assessment of Marking Duties on liquidated Consumption Entries in a Prior Disclosure case." *Id.* In response to Bridalane's claim, Customs agreed to hold the matter in abeyance until a decision in the *Pentax* case was issued.

On September 17, 1997, the Court of Appeals for the Federal Circuit issued its decision in *Pentax*, in which it held that the plaintiff in that case was "not required to tender the 10 percent *ad valorem* duties that [arose] under Section 1304(f) to receive prior disclosure treatment." *Pentax Corp.*, 125 F.3d at 1463. Accordingly, by letter dated September 23, 1997, Bridalane, through its counsel, corresponded with Customs and asserted that the decision of the Court of Appeals for the Federal Circuit in *Pentax* was dispositive as to the issue of whether Bridalane owed marking duties under its prior disclosure. *Compl.*, Ex. E at 2. Bridalane further requested that its prior disclosure be considered complete with the prior tender of $51,995.20. *Compl.*, at 5. By letter, dated February 5, 1998, Customs renewed its request that Bridalane deposit $62,727.10 in marking duties to perfect its prior disclosure. *Compl.*, Ex. F. By letter dated February 16, 1998, Bridalane, through its counsel, again requested that the Customs Service review its position in light of the *Pentax* decision. *Compl.*, Ex. G at 1. Customs agreed. By letter, dated June 8, 1998, Customs advised that it remained Customs' position that Bridalane owes marking duties in the amount of $62,727.10. *Compl.*, Ex. H. Notwithstanding the *Pentax* decision, in the June 8, 1998 letter, Customs notified Bridalane of its position that when there is both a false marking on the goods and false country of origin declared on the entry documents, marking duties must be tendered to perfect a prior disclosure claim.[1] Accordingly, Customs demanded that Bridalane tender the marking duties within 10 days of its receipt of the June 8 letter. *Id.* Customs subsequently granted Bridalane an additional extension of the time period to July 8, 1998 in which marking duties could be tendered for prior disclosure purposes. *Def.'s Br.*, at 7.

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[1] Customs' position that the *Pentax* decision is not dispositive of the issue of whether marking duties are required to be tendered to perfect a prior disclosure in the instant case is premised, in part, on the opinion rendered by the Court of Appeals for the Federal Circuit in response to the Government's motion for rehearing in *Pentax*. *See Pentax Corp. v. Robison*, 135 F.3d 760 (Fed. Cir. 1998). Upon rehearing, the Federal Circuit expressly declined to address the Government's theory that the submission of false entry documents in *Pentax* constituted a separate violation of 19 U.S.C. § 1592(a), thereby providing an independent basis for recovering marking duties pursuant to 19 U.S.C. § 1592(d) and for requiring payment of the duties as a prerequisite for prior disclosure treatment. *Pentax*, 135 F.3d at 762.

Bridalane commenced this action in this court on July 8, 1998 and requested leave of the court to deposit the $62,727.10 in controversy with the Clerk of Court pursuant to the provisions of Rule 67 of the Rules of the U.S. Court of International Trade. On July 9, 1998, Customs issued Bridalane a notice of penalty in the amount of $229,444.60 pursuant to 19 U.S.C. § 1592 for violation of various provisions of the relevant statutes and Customs regulations. *Pl.'s Br.*, at 4. The notice of penalty asserted that Bridalane's actions were negligent within the meaning of 19 U.S.C. § 1592. *Id.*

THE STATUTE

Section 1592(a) of Title 19 makes it a violation for an importer to enter or introduce merchandise into the United States by means of a materially false statement or material omission. The maximum penalties that may be assessed for fraudulent, grossly negligent, and negligent violations of the statute are set forth in 19 U.S.C. § 1592(c)(1)–(3) and 19 C.F.R. § 162.73. These penalties vary according to the level of culpability, the value of the merchandise, and the revenue loss caused by the violation. Significant reductions to these maximum penalties are provided in 19 U.S.C. § 1592(c)(4), the "prior disclosure" provision. A prior disclosure occurs if the violator discloses the circumstances of a violation before or without knowledge of the commencement of a formal investigation of such violation and tenders the actual loss of duties resulting from the violation under subsection (a) of § 1592. The duties of which the government is deprived by reason of the violation of subsection (a) are also recoverable under 19 U.S.C. § 1592(d).

Depending upon the degree of culpability, the violator who makes a valid prior disclosure in accordance with 19 U.S.C. § 1592(c)(4) will be assessed a penalty of either interest on the loss of revenue (negligent or grossly negligent violations) or an amount equal to the loss of revenue (fraudulent violations). NAFTA prior disclosures are treated in a significantly different manner. Unlike 19 U.S.C. § 1592(c)(4), the prior disclosure provisions of 19 U.S.C. § 1592 at (c)(5) provide that the violator *will not be assessed a penalty* under 19 U.S.C. § 1592(a) for making an incorrect claim for preferential tariff treatment under NAFTA, if in accordance with regulations issued by the Secretary of the Treasury, the violator "voluntarily and promptly makes a corrected declaration and pays any duties owing." 19 U.S.C. § 1592(c)(5)(B). Section 181.82 of the Customs Regulations (19 C.F.R. § 181.82(1998)) provides the administrative procedures for NAFTA prior disclosure and governs Bridalane's prior disclosure for importations occurring on and after January 1, 1994. Section 181.82 requires that the violator tender the actual loss of duties in order to receive the benefits of a NAFTA prior disclosure. Section 181.1 of the Customs Regulations (19 C.F.R. § 181.1(1998)) defines Customs duty in the context of NAFTA to be any Customs or import duty and a charge of any kind imposed in connection with the importation of a good.

DISCUSSION

The Government's position is that there may be no importer actions with regard to 19 U.S.C. § 1592. According to the Government, the only access to the court is pursuant to a government action to recover 19 U.S.C. § 1592 duties and/or penalties pursuant to 28 U.S.C. § 1582 (1994) and that administrative procedures provide all the relief necessary for the importer. The courts have not agreed with this position. *Trayco, Inc. v. United States*, 994 F.2d 832 (Fed. Cir. 1993) recognized a Tucker Act remedy for recovery of erroneously extracted 19 U.S.C. § 1592 penalties. *Tikal Distrib. Corp. v. United States*, 970 F. Supp. 1056, 1062–64 (Ct. Int'l Trade 1997) declined to extend *Trayco* to find a substantive right to recover duty payments voluntarily tendered to avoid penalties, but recognized 28 U.S.C. § 1581(a) jurisdiction for recovery of *duties* involuntarily extracted in the course of 19 U.S.C. § 1592 administrative proceedings relating to merchandise imported after a voluntary tender.

The problem here is that plaintiff seeks prior disclosure treatment, but has not paid the claimed marking duties to Customs because there is no definitive avenue of recovery of the duties if they are wrongfully extracted by Customs and if they are considered part of a "voluntary" prior disclosure. *See Pentax Corp. v. Robison*, 924 F. Supp. 193, 196–98 (Ct. Int'l Trade 1996), *rev'd on other grounds*, 125 F.3d 1457 (Fed. Cir. 1997); *Tikal*, 970 F. Supp. at 1061. The matter is further complicated by Customs' lack of clear regulatory procedures and timetables for protesting post-disclosure exactions of duties under 19 U.S.C. § 1592.

If this matter concerned extracted penalties, the court could say to plaintiffs, "Pay the penalties and seek recovery in district court pursuant to *Trayco*, or do not pay them and let the Government sue you." But the issue here is prior disclosure treatment and the recovery of *duties*, the essence of this court's jurisdiction. The issue of jurisdiction over cases such as the one at hand and other types of 19 U.S.C. § 1592 penalty and duty recovery cases is in considerable turmoil.[2] Nonetheless, the court must decide whether there is jurisdiction here to resolve the issue of whether *marking* duties must be paid to obtain prior disclosure treatment. The state of the law is still undecided as to whether marking duties, which arise only when the law is violated, are the type of duty that courts have found must be paid to receive prior disclosure treatment. The court concludes that importers should not be forced to forfeit marking duties without being allowed a chance to litigate the issue. *But cf. Tikal*, 970 F. Supp. at 1063, n. 9 (duties (not marking) paid for prior disclosure treatment; no importer suit jurisdiction; no due process de-

[2] The Court of Appeals could assist in this matter by spelling out in definitive fashion the appropriate avenues of jurisdiction. It might begin by reconsidering the holding of *Trayco* and its broader implications. Once the court recognized the substantive right of penalty recovery in *Trayco*, jurisdiction in this court makes sense under the statutory scheme. Section 1581(i) of Title 28 seems broad enough to provide jurisdiction over the substantive right because penalty recovery actions relate to the enforcement and collection of customs duties. Certainly if there is a right to recover duties erroneously paid to obtain prior disclosure benefits, jurisdiction in the Court of International trade exists. Alternatively, the government might seek legislation to make clear that there is meaningful relief under the statute for both 19 U.S.C. § 1592 penalty and duty recovery, and that there is not substantial deprivation without judicial scrutiny. *See Ex Parte Young*, 209 U.S. 123, 148 (1908).

privation).[3] The court finds Congress did not intend in the enactment of 19 U.S.C. § 1592 to deprive the parties of a judicial avenue of relief in a case such as the one at hand.

In any normal understanding of the term, the duty payments at issue are not "voluntary." As the plaintiff tendered duties to the court by seeking to deposit them on the date suit was commenced and the court has ordered them accepted into the registry of the court, plaintiff has perfected its right to protest denial jurisdiction in this case. *See* 28 U.S.C. § 1581(a) (protest denial jurisdiction) and 28 U.S.C. § 2637(a) (1994) (payment of duties required to commence § 1581(a) action).[4] On February 16, 1998, plaintiff protested the government's February 5, 1998 decision to compel payment of marking duties. That protest was denied on June 8, 1998. Suit was timely filed one month later. *See* 28 U.S.C. § 2636(a) (1994) (180 days to file suit after protest denial).

If 28 U.S.C. § 1581(a) jurisdiction does not lie, the court has jurisdiction under 28 U.S.C. § 1581(i) to resolve this dispute arising out of laws providing for duties from imports. *See Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (jurisdiction lies under subsection (i) if other provisions of 28 U.S.C. § 1581 are inadequate). The court believes jurisdiction over this type of action must exist to avoid extreme deprivations without judicial review. *See, e.g. Pentax*, 924 F. Supp. at 197–98. Congress could not have intended otherwise. This is especially so because the government continues to seek payment of marking duties for prior disclosure treatment in the face of a Court of Appeals decision to the contrary. Although the government arguably may continue to litigate a previously rejected theory in a new case, as well as an entirely new theory, there remains a strong possibility that plaintiff may not be required to tender marking duties for prior disclosure treatment. It also remains a possibility that if the duties were received by Customs, 28 U.S.C. § 1581(a) jurisdiction were not available, and Customs were found to be wrong in requiring the duties, they could not be recovered. *See Pentax*, 924 F. Supp. at 197–98; *Tikal*, 970 F. Supp. at 1061. Under these circumstances, the court concludes Congress intended the court to have jurisdiction, and so provided in 28 U.S.C. § 1581(i), if not in § 1581(a).

The motion to dismiss is denied.

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[3] One might argue that Congress never intended to deprive importers of any disputed duties permanently. The prior disclosure scheme may protect Customs adequately merely by requiring payment up-front as a prerequisite to favorable treatment, leaving the parties free to litigate the duty issue. *Tikal*, however, is representative of a line of cases that do not accept this broader view of jurisdiction.

[4] Normally "paid" for purposes of 28 U.S.C. § 2637(a) means paid to Customs, but given the confused state of the law regarding jurisdiction over marking duties paid to receive prior disclosure statement, payment into the registry of the court suffices. This will protect Customs in the same way intended by the statute.

(Slip Op. 98–158)

E.I. DUPONT DE NEMOURS & CO., HOECHST CELANESE CORP. AND ICI AMERICAS INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND SKC LTD., SKC AMERICA, INC., CHEIL SYNTHETICS, INC., SAMSUNG AMERICA, INC., STC CORP., STC OF AMERICA, INC., AMERICAN TAPE CO., AND KOLON INDUSTRIES, INC., DEFENDANT-INTERVENORS

Court No. 95–09–01216

(Dated November 23, 1998)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court, having received and reviewed the United States Department of Commerce, International Trade Administration's (Commerce) *Final Results of Redetermination Pursuant to Court Remand, E.I. DuPont de Nemours & Company v. United States, Slip Op. 98–35, March 26, 1998, Court No. 95–09–01216* ("Remand Results"), filed June 26, 1998, and upon finding that Commerce complied with the Court's remand, hereby

ORDERS that the Remand Results are affirmed in their entirety; and further

ORDERS that, no comments to the Remand Results having been received and all other issues having been decided, this case is dismissed.

PUBLIC VERSION

(Slip Op. 98–159)

AK STEEL CORP., INLAND STEEL INDUSTRIES, INC., BETHLEHEM STEEL CORP., U.S. STEEL GROUP—A UNIT OF USX CORP., LTV STEEL CO., INC., AND NATIONAL STEEL CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND POHANG IRON AND STEEL CO. LTD., POHANG COATED STEEL CO. LTD., AND POHANG STEEL INDUSTRIES CO. LTD., DEFENDANT-INTERVENOR, AND UNION STEEL MANUFACTURING CO. LTD., DEFENDANT-INTERVENOR, AND DONGBU STEEL CO. LTD., DEFENDANT-INTERVENOR

Consolidated Court No. 97–05–00865

[Final Results of Second Administrative Review affirmed.]

(Dated November 23, 1998)

Dewey Ballantine LLP (Michael H. Stein, Bradford L. Ward, Elizabeth A.B. McMorrow, Kristen M. Neller, and *Jennifer Danner Riccardi)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lucius B. Lau), Bernd G. Janzen,* Attorney, Office of the Chief Counsel of Import Administration, United States Department of Commerce, of counsel, for defendant.

Akin, Gump, Strauss, Hauer & Feld, L.L.P. (Sukhan Kim, Spencer S. Griffith, and *Samuel C. Straight)* for defendant-intervenors Pohang Iron and Steel Co. Ltd., Pohang Coated Steel Co. Ltd., and Pohang Steel Industries Co. Ltd.

Kaye, Scholer, Fierman, Hays & Handler, LLP (Donald B. Cameron, Julie C. Mendoza, Raymond Paretzky, and *John P. Healy)* for defendant-intervenors Union Steel Manufacturing Co. Ltd. and Dongbu Steel Co. Ltd.

OPINION

RESTANI, *Judge:* This matter is before the court on a Motion for Judgment on the Agency Record, pursuant to USCIT Rule 56.2, filed by AK Steel Corporation, Inland Steel Industries, Inc., Bethlehem Steel Corporation, U.S. Steel Group—A Unit of USX Corporation, LTV Steel Co., Inc., National Steel Corporation (collectively "AK Steel" or "Domestic Producers"), who challenge certain aspects of Commerce's antidumping duty administrative review in *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea*, 62 Fed. Reg. 18404 (Dep't Commerce 1997) (final results of antidumping administrative review) [hereinafter *"Final Results"].* Pohang Iron and Steel Co. Ltd. ("POSCO"), Pohang Coated Steel Co. Ltd. ("POCOS"), and Pohang Steel Industries Co. Ltd. ("PSI");[1] Dongbu Steel Co. Ltd. ("Dongbu"); and Union Steel Manufacturing Co. Ltd ("Union") appear as Defendant-Intervenors (collectively "Foreign Producers") to the Domestic Producers' Motion.

The Department of Commerce ("Commerce") issued an antidumping duty order on certain cold-rolled and corrosion-resistant carbon steel flat products from Korea. *Certain Cold-Rolled Carbon Steel Flat Prod-*

[1] Domestic Producers raised no claims regarding PSI.

ucts and Certain Corrosion-Resistant Carbon Steel Flat Products from Korea, 58 Fed. Reg. 44159 (Dep't Commerce 1993) [hereinafter *"Certain Steel Products from Korea"]*. In response to the August 31, 1995, request of petitioner AK Steel and respondents Dongbu, Union, and POSCO/POCOS/PSI, *Certain Steel Products from Korea*, 61 Fed. Reg. 51882, 51883 (Dep't Commerce 1996) (preliminary results of antidumping administrative review) [hereinafter *"Preliminary Results"],* Commerce initiated an administrative review of the antidumping duty orders for the period from August 1, 1994, through July 31, 1995, *Certain Steel Products from Korea*, 60 Fed. Reg. 46817 (Dep't Commerce 1995) (notice of initiation of administrative review). This review involves four producer-exporters: POSCO, POCOS, Union, and Dongbu.[2]

JURISDICTION

The court has jurisdiction to review the final results of an antidumping duty administrative review pursuant to 19 U.S.C. § 1516a(a)(1)(D) (1994).

STANDARD OF REVIEW

The court upholds the final results of an antidumping duty administrative review unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994).

In questions of statutory interpretation, the court determines first whether Congress has spoken directly to the precise question at issue. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Where a statute is clear and on point, the court gives direct effect to Congress' intent, but where a statute is silent or ambiguous, the court defers to an agency's reasonable interpretation of its statutory mandate. *Id.* at 842–43.

I. EP v. CEP Classification

BACKGROUND

In its administrative review, Commerce classified all U.S. sales of subject merchandise as Export Price ("EP") sales, pursuant to 19 U.S.C. § 1677a(a) (1994). *Final Results*, 62 Fed. Reg. at 18434. Commerce based this decision on an application of the three-part test developed in *PQ Corp. v. United States*, 11 CIT 53, 63–65, 652 F. Supp. 724, 733–35 (1987). This test requires EP (formerly known as "purchase price" ("PP")) classification of sales made prior to import and through affiliated entities in the U.S. where the following criteria are satisfied:

> (1) The subject merchandise was shipped directly from the manufacturer to the unrelated buyer, without being introduced into the inventory of the related shipping agent;

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[2] The distinctness of POSCO and POCOS, as applied to many of Commerce's determinations, is contested by AK Steel because POSCO owns fifty percent of POCOS. POCOS, POSCO, and PSI have submitted a joint brief in support of their positions. For clarity, the court uses the distinction to describe the sales processes associated with these various producers and exporters of subject merchandise.

(2) direct shipment from the manufacturer to the unrelated buyer was the customary channel for sales of this merchandise between the parties involved; and

(3) the related selling agent in the United States acted only as a processor of sales-related documentation and a communication link with the unrelated U.S. buyer.

Final Results, 62 Fed. Reg. at 18423 [hereinafter "*P.Q.* test"]. Where all elements of the test are satisfied, Commerce "consider[s] the exporter's selling functions to have been relocated geographically from the country of exportation to the United States, where the sales agent performs them." *Id.*

Domestic Producers dispute Commerce's use of the *P.Q.* test at all, arguing that Congress intended, through the EP and Constructed Export Price ("CEP") provisions, 19 U.S.C. §§ 1677a(a)–(b) (1994), that Commerce classify as CEP sales transactions which have associated U.S. indirect selling expenses. Thus, Domestic Producers request a remand on this issue. Defendant and Foreign Producers contend that Commerce's use of the *P.Q.* test is in accordance with law and should be affirmed.

Domestic Producers further dispute Commerce's specific application of the *P.Q.* test to these facts, contending that Commerce's classification of U.S. sales by the Foreign Producers as EP sales is not supported by substantial evidence. Specifically, they claim that each Foreign Producer's U.S. affiliate performs services beyond the mere document processing and information conduit functions described by the *P.Q.* test's third prong. Defendant requests a remand to reconsider its classification of the sales as EP because Commerce allegedly did not consider all record evidence. Foreign Producers oppose a remand. The facts individually relevant to POCOS, POSCO, Union, and Dongbu are discussed separately, in that order.

POCOS

To meet a U.S. production order, producer-exporter POCOS first sells subject merchandise to an affiliated Korean trading company, XYI,[3] which takes title. *POSCO's Section A Questionnaire Response* (Oct. 17, 1995), at A–25, C.R. Doc. 3, Pl.'s App., Tab 1, at 14. XYI resells the merchandise to another POCOS affiliate, XYA,[4] located in the United States, *id.*, which takes title and acts as importer of record, *Letter from POSCO to Commerce* (Feb. 27, 1996), at 24, C.R. Doc. 41, Pl.'s App., Tab 9, at 2 ("*POSCO's Letter*"). XYA then resells the merchandise to the unaffiliated customer. *POSCO's Section A Questionnaire Response*, at A–25, Pl.'s App., Tab 1, at 14.

The essential terms of sale are established prior to exportation of subject merchandise from Korea. Customers contact XYA and negotiate the preliminary terms of sale. *POSCO's Letter*, Ex.8, at 9, Pl's App., Tab 9, at 8. There are no published price lists for POCOS' products. *POSCO's Section A Questionnaire Response*, at A–47, Pl.'s App, Tab 1, at 21.

[3] "XYI" is a fictitious name for [ ].

[4] "XYA" is a fictitious name for [ ].

Instead, POCOS provides XYA with quarterly base and other price lists[5] to which XYA adds overhead and brokerage and handling fees to provide a price quotation. *Id.* at A–41, A–47. XYA transmits the price quotation to POCOS for confirmation. *POSCO's Letter*, Ex.8, at 9, Pl's App., Tab 9, at 8. Upon receipt of POCOS' confirmation, XYA issues a sales contract to the customer. *POSCO's Section A Questionnaire Response*, at A–41, Pl.'s App., Tab 1, at 18.

In addition, XYA arranges and pays for marine insurance, U.S. transportation, U.S. customs clearance, and brokerage and handling services for individual shipments of subject merchandise. *Id.*, at A–33, Pl.'s App., Tab 1, at 17. XYA collects payment directly from the customers. *POSCO's Letter*, at 24, Pl.'s App., Tab. 9, at 2.

Domestic Producers contend that XYA has wide latitude in setting price and that POCOS does not exercise control when it confirms XYA's price, but rather simply "rubber stamps" the sale. This sharply contrasts with Commerce's characterization of the relation—placing control over the sale fully with POCOS—implicit in its decision to classify these as EP sales. Specifically, Commerce explained that

> the selling functions of [XYA] * * * are of a kind that would normally be undertaken by the exporter in connection with these sales. The role of [XYA] * * * in the payment of cash deposits of antidumping and countervailing duties, their arrangement of certain movement-related expenses, their involvement in contracts with customers and commissionaires and in activities related to customer payment, are consistent with EP classification and are a relocation of routine selling functions from Korea to the United States.

Final Results, 62 Fed. Reg. at 18433.

POSCO

Producer-exporter POSCO first sells subject merchandise destined for the United States to ABI,[6] a trading company wholly owned by POSCO, which takes title to the merchandise. *POSCO's Letter*, at 29, Pl.'s App., Tab 9, at 3. ABI resells the merchandise to ABA,[7] also wholly owned by POSCO, located in the United States. *Id.* ABA takes title to the merchandise, and acts as importer of record. *Id.*, at 29–30, Pl.'s App., Tab 9, at 3–4. ABA resells the merchandise to the unaffiliated customer. *POSCO's Home Market Verification Report* (Sept. 18, 1996), Ex. 24, at 54, C.R. Doc. 170, Pl.'s App., Tab 29, at 9.

The terms of sale are established prior to export to the United States. U.S. customers submit purchases orders to ABA with a price per unit stated on the order. *Id.* at 20, Pl.'s App., Tab. 29, at 7. Then the order is submitted to POSCO in Korea for confirmation, after which ABA issues the invoice to the customer. *POSCO's Letter*, at 29–30, Pl.'s App., Tab 9, at 3–4, *POSCO's Home Market Verification Report*, at 78, Pl.'s App., Tab 29, at 9. ABA arranges and pays for services such as U.S. inland trans-

[5] These are, specifically, lists of [ ] prices.

[6] "ABI" is a fictitious name for [ ].

[7] "ABA" is a fictitious name for [ ].

portation, U.S. customs clearance, and brokerage and handling for individual shipments of subject merchandise. *POSCO's Letter*, at 29–30, Pl.'s App., Tab 9, at 3–4. In addition, ABA collects payment from customers. *Id.*, at 29, Pl.'s App., Tab 9, at 3.

Domestic Producers requested that POSCO's U.S. sales be classified as CEP sales. *Domestic Producers' POSCO Case Brief* (March 5, 1997), at 5, C.R. Doc. 226, Pl.'s App., Tab 33, at 2. Commerce classified them, however, as EP sales. *Final Results*, 62 Fed. Reg. at 18433.

Union

Producer-exporter Union sells to its U.S. affiliate, Union America, which takes title, *Union's Section A Questionnaire Response* (Oct. 20, 1995), at 16, C.R. Doc. 5. Pl.'s App., Tab 3, at 4, and acts as importer of record, *Union's CORR Letter* (Feb. 29, 1996), Ex. C–20, at 1, C.R. Doc. 44, Pl.'s App., Tab 14, at 24. Union America resells the merchandise to the unaffiliated customer in the United States. *See Union's Home Market Sales Verification Report* (Aug. 21, 1996), at Ex. 74, at 3, C.R. Doc. 137, Pl.'s App., Tab 20, at 11.

Customers have initial contact with[8] Union America, *see, e.g.*, *Union's Home Market Sales Verification Report*, at Ex. 71, at 5, Pl.'s App., Tab 20, at 8, which negotiates the initial price with the customer based on certain factors[9] established by Union, *Union's Section A Questionnaire Response*, at 20, Pl.'s App., Tab 3, at 5. The purchase order is sent to Union for confirmation, *Union's Section A Questionnaire Response*, at 12, Pl.'s App., Tab 3, at 2, after which Union America invoices the sale to its U.S. customer, *Letter from Union to Commerce* (Nov. 27, 1995), Ex. C–6, at 1, C.R. Doc. 14, Pl.'s App., Tab 7, at 9 [hereinafter "*Union's CORR Section A (or C) Questionnaire Response*,"], and Union fills the order, *see Union's Section A Questionnaire Response*, at 12, Pl.'s App., Tab 3, at 2.

Union America performs market research and economic planning, *Union's CR Letter* (Feb. 29, 1996), at 56, C.R. Doc. 44, Pl.'s App., Tab 13, at 3, sometimes taking steps[10] to find customers, *Union's CORR Section A Questionnaire Response*, Ex. C–6, at 1, Pl.'s App., Tab 7, at 9. Union America also arranges and pays for post-sale warehousing, *Union's Section A Questionnaire Response*, at 12, n.6, Pl.'s App., Tab 3, at 2, U.S. transportation, *Union's CORR Section C Questionnaire Response*, at 25, Pl.'s App., Tab 7, at 2, regular U.S. customs duties, brokerage and handling, and other expenses,[11] *Union's CR Letter* at Ex. C–9, C–10, Pl.'s App., Tab 13, at 7, 16; *Union's CORR Letter*, Ex. C–16, C–20, Pl.'s App., Tab 14, at 6, 23. In addition, Union America extends credit to U.S. customers, *Union's CR Questionnaire Response* (Nov. 27, 1995), at 29, C.R. Doc. 12, Pl.'s App., Tab 5, at 2, and maintains relationships with

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[8] Customers [ ] Union America.

[9] Union America negotiates the initial price with the customer based on [ ] established by Union.

[10] Union America sometimes [ ] to find customers.

[11] Union America arranges and pays for [ ].

them, *Union's U.S. Sales Verification Report*, at 8, C.R. Doc. 135, Pl.'s App., Tab 19, at 4.

During the administrative review, Domestic Producers requested that Union's U.S. sales be classified as CEP sales. Commerce, however, classified them as EP sales. *Final Results*, 62 Fed. Reg. at 18439. Specifically, Commerce stated that

> [Union America's] selling functions are of a kind that would normally be undertaken by the exporter in connection with these sales. More specifically, we regard selling functions, rather than selling prices, as the basis for classifying sales as EP or CEP. * * * In this case, Union has transferred these routine selling functions to its related selling agent in the United States and the substance of the transaction is unchanged.

Id.

Dongbu

Producer-exporter Dongbu sells subject merchandise destined for the United States to an affiliated Korean trading company, Dongbu Corporation, which takes title to the merchandise. *Dongbu's Section A Questionnaire Response* (Oct. 17, 1995), at 12, C.R. Doc. 4, Pl.'s App., Tab 2, at 2. Dongbu Corporation then resells the merchandise to another Dongbu affiliate located in the United States, Dongbu USA, which takes title to the merchandise, and acts as importer of record. *Id.* at 14, Pl.'s App., Tab 2, at 3; *Dongbu's Section B and C Questionnaire Response* (Nov. 27, 1995), at 101, C.R. Doc. 11, Pl.'s App., Tab 4, at 5. Dongbu USA then completes the transaction.[12] *Letter from Dongbu to Commerce* (Feb. 29, 1996), at Ex. A–24, at 4, C.R. Doc. 45, Pl.'s App., Tab 15, at 9 (*"Dongbu's Letter"*).

Essential terms of sale of subject merchandise from Korea are established prior to export. *Dongbu's Section A Questionnaire Response*, at 12, Pl.'s App., Tab 2, at 2. Customers contact Dongbu USA and submit purchase orders.[13] *Dongbu's Letter*, at Ex. A–24, at 3, Pl.'s App., Tab 15, at 8. Dongbu USA communicates further with Dongbu.[14] *Dongbu's Section A Questionnaire Response*, at Ex. A–8, Pl.'s App., Tab 2, at 15. Once confirmation is received, Dongbu USA issues the sales contract. *Id.*, at Ex. A–8, A–9, Pl.'s App., Tab 2, at 15, 18. In addition, Dongbu USA pays for various services,[15] and arranges and pays for additional services.[16] *Id.*, at 14, Pl.'s App., Tab 2, at 3. Dongbu USA also extends credit to customers, *Dongbu's Section B and C Questionnaire Response*, at 90, Pl.'s App., Tab 4, at 3, and handles all billing and accounting functions relating to U.S. sales, *Dongbu's Section A Questionnaire Response*, at Ex. A–8, Pl.'s App., Tab 2, at 15.

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[12] Dongbu USA [ ].

[13] The purchase orders [ ].

[14] Dongbu USA [ ].

[15] Dongbu USA pays for [ ].

[16] Dongbu USA arranges and pays for [ ].

Domestic Producers requested that Dongbu's U.S. sales be classified as CEP sales. *Domestic Producers' Dongbu Case Brief* (Dec. 2, 1996), at 4, P.R. Doc. 415, Def.'s App., Ex. 5, at 3. Commerce, however, classified Dongbu USA's U.S. sales as EP sales. *Final Results*, 62 Fed. Reg. at 18423. Specifically, Commerce stated that

> Dongbu USA's selling functions are of a kind that would normally be undertaken by the exporter in connection with these sales. Dongbu USA's role in the payment of cash deposits of antidumping and countervailing duties, extension of credit to U.S. customers, the processing of certain warranty claims, and project development are consistent with EP classification and are a relocation of routine selling functions from Korea to the United States.

Id

Discussion

Having classified the U.S. sales at issue as EP sales, Commerce now asserts that it failed to consider all evidence of record and desires a remand to reconsider the classification in light of this error. The court finds this position disingenuous. The documents cited by Government counsel at oral argument have been central to the proceeding. Further, they do not detract from the substantial evidence which supported Commerce's original determination. Commerce had ample time before oral argument to establish error warranting remand. It did not do so. Nor have the domestic producers established error.

The three-part *PQ.* test has been accepted by the court, *see Mitsubishi v. United States*, 15 F. Supp. 2d 807, 813–14 (Ct. Int'l Trade 1998), and its use here did not contradict the statute. The test is simply a means to determine whether the sale at issue for antidumping duty purposes is in essence between the exporter/producer and the unaffiliated buyer, in which case the EP rules apply, or whether the intermediate sale to the affiliate has sufficient substance that the CEP rules apply. There is no conflict between the words of 19 U.S.C. §§ 1677a(a)–(b) and the *PQ.* test. The focus here is on the third prong of the test: whether the sales agent is more than a communication link and a paper processor.

As indicated in *U.S. Steel Group—A Unite of USX Group v. United States*, 15 F. Supp. 2d 892, 903 (Ct. Int'l Trade 1998), at the time Commerce made the determination at issue, the distinctions drawn under the third prong of the *PQ.* test were extremely subtle. Nonetheless, there was nothing of record indicating clearly that the sales agents at issue here took steps beyond those still found acceptable for EP (formerly PP) classification purposes in many cases. *See e.g. Outokumpu Copper Rolled Prods. AB v. United States*, 17 CIT 848, 858–59, 829 F. Supp. 1371, 1379–80 (1993) (PP classification sustained where U.S. affiliate took title to merchandise and paid warehousing fees related to "just in time" delivery), *remand results affirmed*, 18 CIT 204, 850 F. Supp. 16 (1994); *E.I. DuPont de Nemours & Co. v. United States*, 17 CIT 1266, 1281–82, 841 F. Supp. 1237, 1249–50 (1993) (PP classification sustained where U.S. affiliate received purchase orders and payments from, and

sent invoices to, customers and acted as importer of record); *Zenith Elecs. Corp. v. United States*, 18 CIT 870, 874 (1994) (PP classification sustained where customary sales channel was direct shipment from producer to unaffiliated customer and U.S. affiliate did not introduce merchandise into inventory); *Independent Radionic Workers of America v. United States*, 19 CIT 375, 375 (1995) (PP classification sustained where U.S. affiliate "processed purchase orders, performed invoicing, collected payments, arranged U.S. transportation and was the importer of record").

Nothing in the record clearly indicates that the sales agents here were free to negotiate prices as were the agents in *U.S. Steel*, 15 F. Supp. 2d at 901. While before the final determination Commerce may have been free to assess the evidence differently than it did, it was not error to classify the sales at issue as EP sales. The court suggests that Commerce devise some clearer standards for EP/CEP decision-making, but those standards cannot be applied in a case such as this, where the standards applied were acceptable at the time applied and where substantial evidence existed for the decision made.

II. Collapsing the POSCO Group and Application of the Fair Value and Major Input Provisions to Susbstrate Transfers Between POSCO Group Members

BACKGROUND

Commerce collapsed POSCO, POCOS, and PSI into the POSCO Group for its dumping analysis and levied a single antidumping duty on the entire group. *Final Results*, 62 Fed. Reg. at 18430. POSCO supplies POCOS and PSI with various types of rolled coil substrate, the major input to the subject merchandise these companies sell in the U.S. *Letter from POSCO to Commerce* (April 12, 1996), at 26, C.R. Doc. 66, Def.'s Conf. App., Ex. 6, at 3. In its *Preliminary Results*, 61 Fed. Reg. at 51887, Commerce applied 19 U.S.C. §§ 1677b(f)(2)–(3) (1994), the fair value[17] and major input[18] provisions, to calculate substrate costs for the POSCO group. This method required Commerce to treat each member of the collapsed POSCO group as an individual entity for the purpose of calculating substrate costs. 19 U.S.C. § 1677b(f)(2)–(3). Commerce used the

[17] The statute provides, in relevant part:

(2) Transactions disregarded

A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.

19 U.S.C. §§ 1677b(f)(2).

[18] The statute provides in relevant part:

(3) Major input rule

If, in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, then the administering authority may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under paragraph (2).

19 U.S.C. § 1677b(f)(3).

transfer price POSCO charged to POCOS and PSI as the substrate value in its EP calculations. *Preliminary Results*, 61 Fed. Reg. at 51887.

POSCO challenged this before Commerce, arguing that if Commerce were to levy a single antidumping duty upon the entire POSCO Group, it would be inconsistent to calculate substrate costs by separating the affiliated entities. *POSCO's Response to Petitioner's Comments* (Sept. 25, 1996), at 19, P.R. Doc. 367, Def. App., Ex. 14, at 2. Domestic Producers countered that POSCO, POCOS, and PSI meet the definition of affiliates in 19 U.S.C. § 1677(33) (1994), so the fair value and major input provisions should apply. *Petitioners' Rebuttal Brief before Commerce* (Dec. 9, 1996), at 2, P.R. Doc. 421, Def.'s App., Ex. 16, at 2. While collapsing the POSCO Group might be appropriate for levying the antidumping duty, they argued, such intimate affiliation does not elide corporate boundaries for purposes of calculating substrate costs. *Id.*, at 5, Def.'s App., Ex. 16, at 5.

Commerce agreed with POSCO that collapsing the POSCO Group required Commerce to consider the substrate sales as between different parts of a single entity, not as between separate affiliated entities, so 19 U.S.C. §§ 1677b(f)(2)–(3) would not apply. *Final Results*, 62 Fed. Reg. at 18430. Commerce revised its calculation accordingly. *Id.* at 18,431. Domestic Producers here contend that Commerce erred in that revision.

Discussion

Domestic Producers contend that Commerce erred when it collapsed POSCO, POCOS, and PSI into the POSCO Group for sales and costs purposes and calculated a single antidumping margin. Domestic Producers argue that because POSCO owns fifty percent of POCOS, POSCO and POCOS are "affiliated persons" pursuant to 19 U.S.C. §§ 1677(33)(E)–(F) (1994).[19] They reason that Commerce is precluded from collapsing them, because the statute permits collapsing or affiliation, but not both.

Commerce is directed to "determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise." 19 U.S.C. § 1677f–1(c)(1) (1994). Through its collapsing practice, Commerce treats closely related companies as a single exporter or producer for purposes of the antidumping inquiry. The statute defines exporters and producers tautologically as

> the exporter of the subject merchandise, the producer of the subject merchandise, or both where appropriate. For purposes of section 1677b of this title, the term 'exporter or producer' includes both the exporter of the subject merchandise and the producer of the same subject merchandise to the extent necessary to accurately calculate

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[19] The statute provides, in relevant part:

(E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.

(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

19 U.S.C. §§ 1677(33)(E)–(F).

> the total amount incurred and realized for costs, expenses, and profits in connection with production and sale of that merchandise.

19 U.S.C. § 1677(28) (1994). The statute is silent as to what constitutes an individual exporter or producer. Where a statute is silent or ambiguous, the court defers to Commerce's reasonable interpretation of its statutory mandate. *Chevron*, 467 U.S. at 842–43.

Commerce's collapsing practice is long standing, *see e.g. Certain Fresh-Cut Flowers from Colombia*, 61 Fed. Reg. 42833, 42853 (Dep't Commerce 1996) (final results of antidumping administrative review); *Certain Carbon Steel Products from Japan*, 58 Fed. Reg. 37154, 37159 (Dep't Commerce 1993) (final determination), and has been affirmed by the court, *see Asociacion Colombiana de Exportadores de Flores v. United States*, 6 F. Supp. 2d 865, 893 (Ct. Int'l Trade 1998); *see also Queen's Flowers de Colombia v. United States*, 981 F. Supp. 617, 622–23 (Ct. Int'l Trade 1997).[20] As the court has not yet ruled on the issue of whether Commerce's collapsing practice survives the Uruguay Round Agreements Act ("URAA"),[21] Pub. L. No. 103–465, 108 Stat. 4809 (1994), the issue bears closer examination.[22]

The statute leaves Commerce the discretion to collapse. The definition of exporter or producer, 19 U.S.C. § 1677(28) permits Commerce to include the producer and exporter of the subject merchandise "to the extent necessary."[23] Under both the "fair value" and "major input" provisions, 19 U.S.C. §§ 1677b(f)(2)–(3), Commerce "may" disregard transactions between affiliated parties if they do not reflect market val-

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[20] *Queen's Flowers* was decided under the prior version of the statute defining exporters, 19 U.S.C. § 1677(13) (1988), which was amended by Pub. L. 103–465 § 222(i)(1) in 1994. Minor changes to the language of the statute, however, do not affect the collapsing issue.

[21] Post-URAA law applies to this case. The URAA amendments took effect January 1, 1995. Pub. L. No. 103–465 § 291, 108 Stat. at 4931. Commerce initiated its review of the antidumping duty order in *Certain Steel Products from Korea*, on September 8, 1995, 60 Fed. Reg. at 46817, and published its Final Results on April 15, 1997, 62 Fed. Reg. at 18405.

[22] Commerce is under the impression that collapsing continues. In 1996, Commerce published proposed rules to incorporate the URAA amendments, which include a codification of collapsing. *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7330 (Dep't Commerce 1996). Under the heading, "Treatment of affiliated producers in antidumping proceedings," the proposed rules provide that

> the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production.

Proposed 19 CFR § 351.401(f); *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. at 7381. Note the use of the new statutory term, "affiliated persons," in conjunction with reference to collapsing. Thus, under certain conditions, Commerce "would treat related producers that were separate legal entities as a single entity. * * * Where firms were so collapsed, the Department would issue a single questionnaire to, and calculate a single weighted-average dumping margin for, the collapsed entity." *Id.* at 7330.

Subsection (1) of Commerce's final rule on collapsing retains the language of the proposed rule. 19 C.F.R. § 351.401(f)(1) (1997). Commerce explained that the "significant potential for price manipulation" language entails that "collapsing requires a finding of more than mere affiliation," but is not such a high standard that Commerce will only collapse in "'extraordinary' circumstances." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27296, 27345 (Dep't Commerce 1997).

[23] The statute provides, in relevant part:

> * * * the term "exporter or producer" includes both the exporter of the subject merchandise and the producer of the same subject merchandise *to the extent necessary* to accurately calculate the total amount incurred and realized for costs, expenses, and profits in connection with production and sale of that merchandise.

19 U.S.C. § 1677(28) (emphasis added).

ue, but does not appear to be required by the statute to do so.[24] Thus Commerce has the discretion to disregard transactions between affiliated parties where appropriate. Commerce has deemed the case of collapsed entities to be such an instance.

There is no explicit reference to collapsing in the legislative history. The legislative history reflects Congressional awareness of collapsing. With reference to the definition of exporter or producer in 19 U.S.C. § 1677(28), the Senate noted that where different firms perform the production and selling functions, Commerce *may* include the costs, expenses, and profits related to sales of subject merchandise of each firm, *consistent with Commerce's current practice*. S. Rep. No. 103–412, at 61 (1994) (emphasis added). The court finds Commerce's interpretation of the statute as continuing to permit collapsing to be reasonable.

Domestic Producers argue that even if Commerce could collapse the members of the POSCO Group, Commerce erred in not applying the fair value and major input provisions, 19 U.S.C. §§ 1677b(f)(2)–(3), to substrate transfers between POSCO Group companies, because these are mandatory provisions for affiliated companies, collapsed or not. Domestic Producers argue that POSCO and POCOS meet the definition of affiliated parties in 19 U.S.C. §§ 1677(33)(E)–(F), which make no reference to, or exception for, collapsed companies. The court affirms Commerce's determination that the provisions did not apply because, once collapsed, the POSCO Group was a single entity, not a group of "affiliated persons." *Final Results*, 62 Fed. Reg. at 18430–31.

While POSCO and POCOS, if considered separately, meet the definition of affiliated persons in 19 U.S.C. §§ 1677(33)(E)–(F), the fact that the fair value and major input provisions, 19 U.S.C. §§ 1677b(f)(2)–(3), do not refer to collapsed entities, and only to "affiliated persons," does not mean the statute requires application of these provisions to collapsed groups. The court finds, rather, that because the statute is silent about, and does not conflict with, Commerce's collapsing practice, Commerce is within its discretion in deciding to treat collapsed parties as no longer separate affiliates for purposes of 19 U.S.C. §§ 1677b(f)(2)–(3). *See Chevron*, 467 U.S. at 842–43.

Commerce reasoned that 19 U.S.C. §§ 1677b(f)(2)–(3) did not apply because "a decision to treat affiliated parties as a single entity necessitates that transactions among the parties also be valued based on the group as a whole." *Final Results*, 62 Fed. Reg. at 18430. This is consistent with Commerce's practice of not applying the fair value and major

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[24] The "fair value" provision states, in relevant part:

> (2) Transactions disregarded.
> A transaction directly or indirectly between affiliated persons *may be disregarded* if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration.

19 U.S.C. § 1677b(f)(2) (emphasis added). The "major input" provision states, in relevant part:

> (3) Major input rule.
> If, in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, then the administering authority *may determine* the value of the major input on the basis of the information available. . . .

19 U.S.C. § 1677b(f)(3) (emphasis added).

input provisions to transfers of substrate between divisions of the same company. *Certain Forged Steel Crankshafts from the United Kingdom*, 61 Fed. Reg. 54613, 54614 (Dep't Commerce 1996) (final results of antidumping duty administrative review). Commerce did apply the provisions to substrate transfers between partially collapsed companies in *Large Newspaper Printing Presses from Germany*, 61 Fed. Reg. 38166, 38187–88 (Dep't Commerce 1996) (final determination), but there the companies manufactured different equipment models and were collapsed for cost purposes for selected items only, but not for all purposes, 61 Fed. Reg. at 38188, as in this case.

As the agency notes this review marks a change in Commerce's collapsing practice. *Final Results*, 62 Fed. Reg. at 18430–31 ("We find that our prior practice of collapsing entities while continuing to apply the fair-value provision and the major-input rule is improper."). As of the administrative decision reviewed in *Fag v. United States*, No. 98–133, slip op., 1998 WL 721119 (Ct. Int'l Trade 1998), Commerce had not fully considered whether collapsed companies should be regarded as a single entity or as related parties. Whether or not Commerce's treatment of collapsed companies as related parties for purposes of calculating constructed value was permissible under the old statute and accorded with pre-URAA administrative practice, as found in *Fag (U.K.)*, No. 98–133, slip op. at 14–17, 1998 WL 721119, the court now recognizes Commerce's revised interpretation and changed practice as not only permissible but preferable as a more logical, integrated application of the statute. *See Chevron*, 467 U.S. at 863 (initial agency interpretation not "carved in stone"); *see also* David M. Gossett, Comment, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. Chi. L. Rev. 681, 682 (1997) (courts equally deferential to revised agency statutory interpretations).

Commerce determined that POSCO, POCOS, and PSI represent one producer of subject merchandise and collapsed them into a single entity, the POSCO Group, for both sales and costs purposes. Once collapsed, the POSCO Group was treated as a single entity, not a set of affiliated persons. Commerce reasonably determined that it should act consistently with its collapsing determination and not apply inconsistent solitary provisions, thereby arbitrarily increasing respondents' liability. Therefore, the court sustains Commerce's decision not to apply the fair value and major input provisions to these entities which were collapsed for all relevant purposes.

III. Affiliation of POSCO with Union or Dongbu

BACKGROUND

POSCO and Union's parent company, DSM, own 50 and 49.99 percent of their joint venture, POCOS, respectively. *POSCO's Section A Questionnaire Response*, at 17, Def.'s App., Tab 1, at 11. Commerce determined that POSCO and Union were not affiliated through "their respective affiliations with DSM." *Final Results*, 62 Fed. Reg. at 18417. Commerce concluded that because neither POSCO nor Union owns,

controls, or holds with power to vote, 5 percent or more of the other's outstanding stock or shares, they cannot be deemed affiliated pursuant to 19 U.S.C. § 1677(33)(E). *Final Results*, 62 Fed. Reg. at 18417. Commerce also determined that POSCO and Union are not affiliated pursuant to 19 U.S.C. § 1677(33)(F), because the evidence does not show that these companies constitute "(t)wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person." *Final Results*, 62 Fed. Reg. at 18417.

A. Corporate Relationships

Domestic Producers argued before Commerce that if Commerce collapsed POSCO and POCOS into a single entity, then it should also collapse DSM and Union. POSCO and Union would then be affiliated through POSCO's and DSM's joint venture in POCOS. The Domestic Producers claimed that Union's and POCOS' common use of XYA as their sales affiliate in the U.S. underscores POSCO's affiliation with Union. *Letter from AK Steel to Commerce* (Feb. 27, 1997), at 82, 99–100, 102, 106, 108, C.R. Doc. 224, Pl.'s App., Tab 32, at 2–8. Commerce disagreed, explaining that

> [s]ubsection (F)'s affiliation standard is met where two parties control a third party, as here. But such a finding of affiliation does not mean that the two affiliated parties control one another. The alleged link between POSCO and Union is even more tenuous. Because POSCO does not control DSM, Union's parent company, DSM is not a vehicle through which POSCO can indirectly control Union, DSM's subsidiary. In other words, POSCO affiliation with DSM and DSM control of Union do not add up to POSCO control of Union.

Final Results, 62 Fed. Reg. at 18417–18. Commerce concluded that no record evidence showed either Union or POSCO to be "in a position to control, either legally or operationally, the other party," as provided by 19 U.S.C. § 1677(33)(G). *Id.* at 18418.

B. Supplier Reliance

Domestic Producers also sought to ground an affiliation between POSCO and Union and one between POSCO and Dongbu on Union's and Dongbu's alleged common reliance on POSCO as their main supplier of hot-rolled coil, the principal input material for the subject merchandise. During the period of review, POSCO supplied a large percentage,[25] by volume, and a large percentage,[26] by value, of all hot-rolled coil consumed by Dongbu, *Dongbu's Letter*, at 7, Pl.'s App., Tab 15, at 2, and a large percentage,[27] by volume, and a large percentage,[28] by value, of all hot-rolled coil consumed by Union, *Union's CR Letter*, Pl.'s App., Tab 13, at 2. In addition, Union and Dongbu purchased hot-

[25] [ ] percent
[26] [ ] percent
[27] [ ] percent
[28] [ ] percent

rolled coil from POSCO even though import prices were lower for 15 out of 23 quarters from 1991 through the third quarter of 1996. *Final Results*, 62 Fed. Reg. at 18417.

Commerce rejected Domestic Producers' claim that POSCO sold to Union and Dongbu at below its cost of production because Domestic Producers' estimation of costs were based on all possible types of hot-rolled coil, not the specific products sold to Union and Dongbu. *Id.* While the average estimated cost of production for all types of hot-rolled coil might be higher than POSCO's prices to Union and Dongbu, Commerce determined that the actual production costs of hot-rolled coil sold to Union and Dongbu were below the sales price. *Id.* Finally, Commerce determined that POSCO, Union, and Dongbu all compete in the U.S. market for sales of finished products. *Commerce's Memo to File* (Aug. 28, 1996), at 2, C.R. Doc. 143, Dongbu's App., Tab 5, at 1.

Commerce noted that a finding of affiliation is unwarranted unless "a situation exists where the buyer has, in fact, become reliant on the seller, or vice versa." *Final Results*, 62 Fed. Reg. at 18417. Moreover, "[t]he record shows that Dongbu and Union have alternate sources of supply for [hot rolled coil], that they can and do purchase significant quantities of [hot rolled coil] from abroad." *Id.* Thus, Commerce determined that POSCO was not affiliated with either Union or Dongbu based on their supplier relationships. *Id.*

DISCUSSION

A. Corporate Relationships

Domestic Producers here again contend that if Commerce may collapse the POSCO Group and treat it as a single entity, it must also find DSM to be affiliated with the POSCO Group, pursuant to 19 U.S.C. § 1677(33)(E), through DSM's fifty percent ownership of POCOS,[29] and thus to be affiliated with POSCO as a member of the POSCO Group. They likewise argue that from DSM's alleged affiliation with Union, Commerce should have derived an affiliation between POSCO and Union, pursuant to 19 U.S.C. § 1677(33)(F).

Based on an analysis of POSCO and POCOS as separate entities, not as members of a single collapsed entity, Commerce determined that neither Union nor DSM were affiliated with POSCO, pursuant to 19 U.S.C. §§ 1677(33)(E)–(F). Commerce may not analyze the relationship of members of the POSCO Group to the outside world as if they were independent once it has collapsed them. Commerce should have determined

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[29] The statute provides, in relevant part:

> The following persons shall be considered to be "affiliated" or "affiliated persons":
>
> * * * * * * *
>
> (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of an organization and such organization.
>
> (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
>
> * * * * * * *
>
> For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.

19 U.S.C. §§ 1677(33).

whether DSM, and thus Union, were affiliated with the entire POSCO Group based on DSM's percentage ownership and control of the POSCO Group through its fifty percent stake in POCOS. All parties agree that POSCO is an extremely large company relative to POCOS, and thus comprises the overwhelming proportion of assets in the POSCO Group. As a result, DSM's fifty percent stake in POCOS translates to an extremely small stake in the POSCO Group. When DSM's relationship to the POSCO Group is analyzed correctly, the only reasonable conclusion on these facts is that DSM has insufficient ownership or control over the POSCO Group to find affiliation pursuant to 19 U.S.C. §§ 1677(33)(E)–(F).

DSM is not "legally or operationally in a position to exercise restraint or direction over the [POSCO Group]," as required by 19 U.S.C. § 1677(33). Commerce already determined that POSCO and DSM are unable to restrain or direct the other's operations. *Final Results*, 62 Fed. Reg. at 18417. It follows that DSM and the POSCO Group cannot direct each other's operations, given that the POSCO Group is both larger and functionally more complex with the addition of POCOS and PSI than POSCO alone. Because DSM is not affiliated with the POSCO Group, Union is not either, as the argument for the latter affiliation depends upon the former. The court therefore sustains Commerce's determination that POSCO and Union are not affiliated through their corporate relationships.

B. Supplier Reliance

Domestic Producers contend that POSCO and Union, and POSCO and Dongbu, are affiliated pursuant to 19 U.S.C. § 1677(33)(G) based on POSCO's role as a major supplier of hot-rolled coil for Union and Dongbu. Domestic Producers argue that the statute requires no more than a determination that Dongbu and Union *may be* reliant on POSCO, rather than evidence of reliance in fact, as Commerce more narrowly interprets it.[30] Domestic Producers maintain that substantial record evidence supports a finding that POSCO's supplier relationship to Dongbu and Union puts POSCO in a position to exercise actual restraint over Dongbu and Union. As the court finds Commerce's interpretation permissible and its factual finding well supported, Commerce's determination is sustained.

Domestic Producers find evidence for their interpretation of the statute in the Statement of Administrative Action ("SAA"), which explains that "[a] company may be in a position to exercise restraint or direction, for example, through * * * close supplier relationships." SAA at 838. Domestic Producers argue that if Congress had meant exclusive reliance,

[30] The statute provides, in relevant part:

> The following persons shall be considered to be "affiliated" or "affiliated persons":
>
> * * * * * * *
>
> (G) Any person who controls any other person and such other person.
>
> For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.

19 U.S.C. § 1677(33).

the drafters would not have used the apparently less stringent terms "close supplier relationship." *Id.* Domestic Producers, however, quote only selectively from the SAA, significantly omitting the end of the sentence containing that language.

> A company may be in a position to exercise restraint or direction, for example, through * * * close supplier relationships *in which the supplier or buyer becomes reliant upon the other.*"

SAA at 838 (emphasis added). The full sentence supports not the Domestic Producers' but rather Commerce's interpretation that a finding of reliance in fact must precede a determination that two parties are affiliated pursuant to 19 U.S.C. § 1677(33)(G). *Id.* Commerce's interpretation, that "control" in a supplier relationship pursuant to 19 U.S.C. § 1677(33)(G) is predicated on a finding that reliance between the parties exists in fact, is reasonable.

The court also finds Commerce's determination that Union and Dongbu were not in fact reliant on POSCO, and vice versa, to be supported by substantial evidence. As indicated, Union and Dongbu purchased large percentages,[31] by volume, or by value,[32] respectively, of their hot-rolled coil from POSCO. *Union's CR Letter*, Pl.'s App., Tab 13, at 2; *Dongbu's Letter*, at 7 Pl.'s App., Tab 15, at 2. Commerce has declined to find affiliation where a producer supplied 100 percent of its U.S. sales through a single, unrelated U.S. importer but where the parties are free to seek other business partners. *See Melamine Institutional Dinnerware Products from Indonesia*, 61 Fed. Reg. 43333, 43335 (Dep't Commerce 1996) (preliminary determination). That Dongbu and Union buy approximately twenty-five percent of their hot-rolled coil supply from other sources shows they are free to buy elsewhere.

Aware that Union and Dongbu continued to buy the majority of their hot-rolled coil from POSCO, despite usually lower import prices, Commerce noted that

> [t]he record indicates that POSCO has a comparative advantage over imported steel for reasons of proximity, cost, reliability of supply, and differences in specifications, grade, and quality, which can explain POSCO's position as principal supplier to Dongbu and Union.

Final Results, 62 Fed. Reg. 18417. Commerce also considered that the cost of production of hot-rolled coil sold to Union and Dongbu was not higher than the sale price. *Id.* Finally, Commerce reflected that POSCO, Union, and Dongbu all compete in the U.S. market for sales of finished products. *Commerce's Memo to File*, at 2, Dongbu's App., Tab 15, at 2. The court finds that Commerce based its determination on this substantial record evidence that Dongbu and Union are not reliant in fact on POSCO for their hot-rolled coil supply. The court therefore sustains

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[31] Union and Dongbu purchased [ ] percent and [ ] percent, by volume, of their hot-rolled coil from POSCO, respectively.

[32] Union and Dongbu purchased [ ] percent and [ ] percent, by value, of their hot-rolled coil from POSCO, respectively.

Commerce's determination that POSCO is affiliated with neither Union nor Dongbu based on a supplier relationship.

IV. Markups

BACKGROUND

Dongbu USA

To export subject merchandise to the U.S., Dongbu employs an affiliated broker, Dongbu Express, that arranges for over-land transportation from the production site to the shipping port in Korea. *Dongbu's Section A Questionnaire Response*, at 24, Pl.'s App., Tab 2, at 8. Commerce deducted the markups Dongbu paid to Dongbu Express in its EP calculation. *Final Results*, 62 Fed. Reg. at 18427.

Domestic Producers argued before Commerce that Dongbu USA's entire markup, which includes movement expenses, sales-related expenses, and profit, likewise should be deducted in Dongbu's EP calculation because Dongbu USA's transactions with Dongbu are identical in substance to those between Dongbu and Dongbu Express. *Id.* at 18425. Commerce determined, however, that Dongbu's transactions with Dongbu USA were different from those with Dongbu Express because Dongbu USA hired an outside broker to handle import services. *Id.* Furthermore, Commerce determined that

> the costs of arranging for U.S. brokerage and handling, U.S. customs clearance, and, as the importer of record, the payment of customs duties, are reflected in the brokerage fees paid by Dongbu USA and are accounted for on a sale-by-sale basis in [Dongbu USA's financial records].

Id. Commerce concluded from this that deducting any additional fees charged by Dongbu USA was not required to accurately calculate EP. *Id.* Domestic Producers challenge this decision.

Union America

For its corrosion-resistant sales, Union reported "barging, inspection fees, entry fees, and handling charges incurred in the United States" in its financial records. *Union's Section B and C Questionnaire Responses*, at C–27, P.R. Doc. 81, Def.'s App., Ex. 29, 4. Commerce deducted these expenditures from Union's EP as a component of aggregated U.S. movement expenses. *Preliminary Results*, 61 Fed. Reg. at 51885–86.

Domestic Producers argued before Commerce that, in addition to the movement charges already reported, the portion of Union America's markup attributable to the provision of movement-related services should be deducted from Union's price in the United States. *Petitioners' Union Case Brief* (Dec. 2, 1996), at 16, P.R. Doc. 414, Def.'s App., Ex. 11, at 5. Specifically, they argued that any amount charged by Union America exceeding its reported U.S. movement expenses (1) represents "charges incurred in bringing the merchandise from the place of shipment to the unaffiliated U.S. customer" and (2) reflects "additional services that would have been sustained by Union in the absence of [Union

America]." *Id.*, at 17–18, Def.'s App., Ex. 11, at 6–7. Domestic Producers also suggested that, because the services provided by Union America were identical in substance to those provided by Dongbu Express, and because no record information permits Commerce to ascertain precisely what portion of Union America's markup can be linked to the movement of the subject merchandise, Commerce should employ the record data for Dongbu Express as a proxy for the markups charged by Union America. *Id.* at 20–21. Domestic Producers maintain that "[t]he resulting amount should be deducted from U.S. price, along with other previously-reported movement charges."

Commerce disagreed and concluded, as it had for Dongbu USA, that

> [Union America] does not directly perform * * * U.S. brokerage and handling services for Union but rather employs customs brokers to carry out such services, to facilitate customs clearance, and to pay any customs duties. We verified that all U.S. brokerage and handling expenses (i.e., demurrage and wharfage charges) incurred by [Union America] on behalf of Union were fully reported on a sale-by-sale basis.

Final Results, 62 Fed. Reg. at 18441. Domestic Producers challenge this decision.

DISCUSSION

Domestic Producers claim that Commerce erred by not considering the movement services provided by Dongbu USA and Union America as parallel to that of Dongbu Express. They repeat their contention that Commerce should have used Dongbu Express' markup as a proxy to establish the markup percentage attributable to Dongbu USA's and Union America's movement expenses. Instead, Commerce deducted from EP the fees Dongbu USA and Union America paid to unaffiliated brokers for services such as customs clearance and handling, pursuant to 19 U.S.C. § 1677a(c)(2)(A) (1994). *Final Results*, 62 Fed. Reg. at 18425, 18441. The court rejects Domestic Producers' analogy and sustains Commerce's determination that the brokerage fees accounted for all costs incident to bringing the subject merchandise from the original place of shipment in Korea to the United States and that further deductions from Dongbu USA's and Union America's markups for movement costs were not required.

Commerce's standard practice is to define movement expenses under 19 U.S.C. § 1677a(c)(2)(A) as the cost of a "market transaction" between unrelated parties. *See High Information Content Flat Panel Displays and Display Glass Therefor from Japan*, 56 Fed. Reg. 32376, 32393 (Dep't Commerce 1991) (final determination) *["Flat Displays from Japan"]* (deduction of markup charged by affiliated companies for U.S. movement expenses from purchase price sales legitimate because markups "were equivalent to prices based upon market transactions"); *see also Toyota Motor Sales, Inc., v. United States*, 17 CIT 841, 846–47, 829 F. Supp. 1364, 1369 (1993) (Commerce's deduction of importer's entire markup from purchase price affirmed because the markup was equiva-

lent to "the actual expenses relating to the movement of subject imports that [the importer] would have incurred regardless of the relationship of the party performing the service"). As the statute[33] does not prescribe a method for Commerce to determine the markup proportion attributable to movement expenses, 19 U.S.C. § 1677a(c)(2)(A), the court defers to Commerce's reasonable interpretation of its mandate. *See Chevron*, 467 U.S. at 842–43. Commerce's understanding that movement expenses are completely captured by the market price of movement services is reasonable.

Commerce's approach to determining Dongbu USA's and Union America's movement expenses was consistent with its approach to Dongbu Express, even though the outcome differed. Dongbu Express' sole function is freight forwarding, so its markup reflects only movement expenses. Because Commerce concluded that Dongbu affiliate Dongbu Express' entire markup was equivalent to the commercially reasonably rates an unaffiliated freight forwarder would have charged, it deducted the entire amount. *Final Results*, 62 Fed. Reg. at 18427.

Unlike Dongbu Express, Dongbu USA and Union America perform sales-related document processing. Moreover, Dongbu USA and Union America themselves do not directly perform movement-related services. Instead, they hire non-affiliated brokers to perform brokerage and handling services. Because Dongbu USA and Union America are involved in both sales and movement functions, Commerce had to determine the markup portion attributable to movement expenses. Commerce reasonably concluded that the brokerage charges captured all movement expenses. When Dongbu USA and Union America hired unaffiliated brokers, they paid the market rate for their services, so Commerce did not need to make a market comparison, as it had made for Dongbu Express, to determine what portion of the markup reflected commercially reasonable rates.

Domestic Producers' suggest that Commerce use Dongbu Express as a proxy to determine the movement expense portion of Dongbu USA's and Union America's markups, as it did in the case of POSCO's and POCOS' U.S. affiliates. Domestic Producers argue that all four U.S. affiliates provide identical services to their Korean counterparts and should be treated analogously. The analogy is false, leading to a senseless result. POSCO's and POCOS' U.S. affiliates perform brokerage services in addition to sales-related document processing. As with Dongbu USA and Union America, Commerce had to determine what portion of their markup was attributable to movement expenses. Unlike Dongbu USA and Union America, however, POSCO's and POCOS' U.S. affiliates per-

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[33] In 1994, Public Law 103–465 § 223 amended 19 U.S.C. § 1677a(d)(2)(A) (1988). The amendment changed the language from

> * * * import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States,

19 U.S.C. § 1677a(d)(2)(A) (1988), to

> * * * import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States,

19 U.S.C. § 1677a(c)(2)(A) (1994). The change does not affect the outcome of this case.

form the brokerage and handling services themselves. Commerce, therefore, could not define their market rate movement expenses according to brokerage fees, because none existed. Instead, Commerce used Dongbu Express' markup as a proxy to determine the movement expense portion of POCOS' and POSCO's U.S. affiliates' markups that approximated its normal practice of defining movement expenses by market transactions. *See Flat Displays from Japan*, 56 Fed. Reg. at 32393. Commerce did not face the same problem with Dongbu USA's and Union America's markups because they hired outside brokers to perform movement-related services. Thus, Commerce defined their movement expenses by their brokerage fees. To use the Dongbu Express markup to gauge the movement expenses of Dongbu USA and Union America, would be to substitute unnecessarily for an actual market transaction a proxy which is itself acceptable only because it approximates one. This could not possibly produce a more accurate determination. Thus the court affirms Commerce's movement expense determination for Dongbu USA and Union America.

V. POSCO's Cost Reconciliation

BACKGROUND

Commerce provided a cost of production and constructed value verification agenda to POSCO which outlined the information it needed to check whether costs reported in POSCO's financial statements reconciled to its cost accounting system and reported manufacturing costs. *Letter from Commerce to POSCO* (June 25, 1996), at 7, P.R. Doc. 283, Pl.'s App., Tab 22, at 2. Requested data included profitability figures for home market, U.S., and third-country sales which Commerce intended to use to reconcile submitted per-unit costs with POSCO's cost of manufacturing statement. *Id.* at 8, Pl.'s App., Tab 22, at 3. POSCO provided Commerce with all requested information, including a profitability analysis for home market, U.S., and third-country sales. *POSCO's Cost Verification Report*, at Ex. 9, C.R. Doc. 26, Def.'s Conf. App. ("Exhibit 26").

After the *Preliminary Results* were published, Domestic Producers claimed that Exhibit 26 showed POSCO's reported costs to be lower than those recorded in its financial statement by a small percentage.[34] *Petitioner's POSCO Case Brief*, at 69, C.R. Doc. 226, Def.'s Conf. App., Ex. 3, at 21. Domestic Producers argued before Commerce that, consistent with Commerce's prior practice, POSCO's reported costs should be increased accordingly. *Id.* at 69, Def.'s App., Ex. 3, at 21.

POSCO then explained that Domestic Producers' analysis of Exhibit 26 was flawed because it compared the sales period of review (August 1, 1994 to July 30, 1995) to the cost period of review (July 1, 1994 to June 30, 1995). *POSCO's Rebuttal Brief*, at 119, C.R. Doc. 435, Def.'s App., Ex. 7, at 22. POSCO further clarified that Exhibit 26 contained esti-

[34] Domestic Producers claimed that Exhibit 26 showed POSCO's reported costs to be lower than those recorded in its financial statement by [ ] percent.

mated third country sales figures based on POSCO's home market sales product distribution because the records it kept did not correspond exactly with Commerce's preferred methodology. *Id.* at 120, Def.'s App., Ex. 7, at 23. Thus, an exact match between sales and costs figures was not possible. *Id.*

Commerce decided not to adjust POSCO's reported costs, explaining that

> the reconciliation provided by the POSCO group establishes that the reported costs are not understated. * * * [and] that the format of the reconciliation necessarily would not result in a perfect match of reported costs to the financial statement, but * * * that the reconciliation did indicate that all costs are captured.

Final Results, 62 Fed. Reg. at 18429.

DISCUSSION

Domestic Producers contend that Commerce lacked substantial evidence for its conclusion that the cost of manufacturing as reported in POSCO's financial statements reconciles with the cost of manufacturing data POSCO provided Commerce. Commerce used as evidence an explanation provided by POSCO at the administrative hearing after the Preliminary Results were published in response to Domestic Producers' challenge that the costs did not reconcile. Specifically, Domestic Producers argue that Commerce is precluded from considering as evidence an explanation proffered after publication of its Preliminary Results because the record was then closed. Domestic Producers further assert that, even if Commerce might consider it, the POSCO Group's explanation is not substantial evidence because it is a self-serving statement. The court disagrees with Domestic Producers and sustains Commerce's determination that POSCO's costs reconcile.

Domestic Producers' are not independent investigators with power to re-verify Commerce's verification. *Micron Technology, Inc. v. United States*, 19 CIT 829, 850, 893 F. Supp. 21, 40 (1995). They may not usurp Commerce's role as fact-finder and substitute their analysis of POSCO's cost data for the result reached by Commerce in the Verification Report. Moreover, the court will not supersede Commerce's conclusions so long as it "applies a reasonable standard to verify materials submitted and the verification is supported by such relevant evidence as a reasonable mind might accept." *Hercules, Inc. v. United States*, 11 CIT 710, 726, 673 F. Supp 454, 469 (1987) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). At verification, Commerce conducted numerous sales traces which it described in detail. *POSCO Cost Verification Report* at 22–24, P.R. Doc. 343, Def.'s App., Ex. 30, at 2–4. The court finds that Commerce applied a reasonable verification standard and had substantial evidence to support its results. *See Micron*, 893 F. Supp. at 40.

Had Commerce sought information at verification that POSCO failed to provide, POSCO would not have been allowed to submit that information at the administrative hearing. Here, however, Domestic Producers first challenged Exhibit 26 at the administrative hearing itself, claiming

their analysis showed that POSCO under-reported its costs. *See Petitioner's POSCO Case Brief*, at 69, Def's Conf. App., Ex. 3, at 21. To respond effectively, POSCO had to provide information in its Rebuttal Brief for which Commerce had never asked before or during verification. Because *Commerce* found no discrepancy at verification, POSCO did not *then* notify Commerce of the third– country sales assumptions inherent in Exhibit 26. Presumably, had Commerce discovered the discrepancy in spot checks and asked for an explanation, POSCO would have submitted the same information at verification rather than in its Rebuttal Brief. Instead, POSCO first became aware that reconciliation was in dispute upon receiving a copy of Domestic Producers' Case Brief, by which time the record was closed. The court will not penalize POSCO for not having submitted information during verification that it was not then aware it needed to provide. Under these exceptional circumstances, the court sustains Commerce's use of POSCO's explanation as record evidence.

As noted, Domestic Producers also challenge POSCO's explanation of the cost discrepancy as a self-serving statement unfit for use by Commerce as substantial evidence. *See Carlisle Tire & Rubber Co. v. United States*, 9 CIT 520, 533, 622 F. Supp. 1071, 1082 (1985); *see also Micron*, 893 F. Supp. at 27–28. In *Carlisle*, the court rejected as substantial evidence a letter from defendant's counsel describing a verification procedure Commerce had failed to describe in its verification report. *Carlisle*, 622 F. Supp. at 1082. Such a self-interested statement could not be relied on to fill a critical gap in the description of Commerce's verification procedure. *Id.* In *Micron*, plaintiff attempted to justify Commerce's choice of a disputed cost allocation methodology with reference to a single remark made by its representative at the administrative hearing. *Micron*, 893 F. Supp. at 27. The court rejected plaintiff's argument:

> Standing alone, this statement offered by a self-interested party after the record had been closed hardly constitutes substantial evidence upon which Commerce could base so sweeping a determination.

Id. at 27–28.

Neither *Carlisle* nor *Micron* stands for the proposition that self-serving statements *per se* may not be used as evidence. To the contrary, a self-interested statement can be relied upon as evidence, so long as it is not contradicted by "harder" evidence, such as objectively verifiable facts. *See Healey v. Chelsea Resources Ltd.*, 947 F.2d 611, 620 (2nd Cir. 1991) ("The fact that such testimony may be self-serving goes to its weight rather than to its admissibility.").

Here, Commerce has described in detail its trace of POSCO's manufacturing costs, *POSCO Verification Report*, at 22–24, Def. App., Ex. 30, at 2–4, while in *Carlisle* it left out a detail critical to its analysis. 9 CIT at 533, 622 F. Supp. at 1082. POSCO's evidence is not meant to redeem Commerce from its failure to submit a complete Verification Report. Commerce's determination that POSCO's costs reconcile is based

on a thorough Verification Report. POSCO's explanation provides a reasonable basis for Commerce to reject Domestic Producers' challenge to Exhibit 26. By contrast with *Micron*, POSCO's explanation is not one offered by a self-interested party to compensate for an utter lack of evidence for Commerce's determination. *See Micron*, 893 F. Supp. at 27. For these reasons, the court finds that Commerce's use of POSCO's explanation as substantial evidence for its determination was reasonable and in accordance with law.

VI. Dongbu's Warehousing Expenses

BACKGROUND

Prior to export, in its warehouse in the port city of Incheon, Dongbu briefly stores unpainted cold-rolled merchandise produced at its factory in Seoul. *Dongbu's Supp. Questionnaire Response* (March 1, 1996), at 79, P.R. Doc. 148, Pl.'s App., Tab 16, at 4. Dongbu explained to Commerce that warehousing is necessary because the factory is far from the port. *Letter from Union to Commerce* (March 28, 1996), at 15, P.R. Doc. 179, Def.'s App., Ex. 31, at 2. Commerce verified that Dongbu reported the warehousing costs as part of manufacturing costs, *HM Verification Report* (Aug. 22, 1996), at 38, P.R. Doc. 327, Def.'s App., Ex. 3, at 3, and accepted this designation in its *Final Results*, 62 Fed. Reg. at 18425.

Domestic Producers argued to Commerce that Dongbu failed to report the pre-sale warehousing expense as an expense "incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States," as required by 19 U.S.C. § 1677a(c)(2)(A). *Letter from AK Steel to Commerce* (Sept. 5, 1996), at 12–13, P.R. Doc. 345, Def. App., Ex. 33, at 2–3. Domestic Producers claimed that the date crucial to the antidumping analysis is the date of shipment from the factory to the warehouse, not the date of shipment from the warehouse itself, and further, that Dongbu had "admitted warehousing *finished* products after production is completed and after shipment from the production facility." *Letter from AK Steel to Commerce* (Dec. 2, 1996), at 19, P.R. Doc. 415, Def. App., Ex. 5, at 17. Domestic Producers thus recommended to Commerce that it consider Dongbu's data to be flawed and instead resort to facts available which could be derived from the warehousing expense data provided. *Id.* at 20, Def.'s App., Ex. 5, at 18.

Commerce declined to make the downward adjustment recommended by Domestic Producers, and stated that Dongbu

> indicated that the warehousing expenses in question are not treated as selling expenses, but rather as cost of manufacturing expenses. [Commerce] noted in the same [verification] report that, as such, the amounts reported in Dongbu's questionnaire response of May 24, 1996, and the method of allocating these expenses, were shown during Dongbu's cost verification to tie directly to audited financial statements. Therefore, as in the preliminary results of these reviews, we have continued to treat these expenses as

> manufacturing overhead expenses, and we have not deducted them from U.S. price for the final review results.

Final Results, 62 Fed. Reg. at 18425.

DISCUSSION

Domestic Producers contend that Commerce erred by classifying Dongbu's Incheon warehousing expenses as a manufacturing cost. Defendant and Domestic Producers now request a remand to reclassify Dongbu's warehousing expenses under 19 U.S.C. § 1677a(c)(2)(A). Warehousing that occurs at a site other than the merchandise's place of production, Domestic Producers argue, is properly classified as a movement expense. 19 U.S.C. § 1677a(c)(2)(A).

The court does not need to decide this issue because, as all parties agreed at oral argument, the dollar amount at the core of this dispute is quite small. If an error did occur, it was harmless error. Therefore, although Defendant acknowledges that an error may have occurred, the court does not remand because, alone, a reclassification of the warehousing expenses will not result in an adjustment of Dongbu's dumping margin. Accordingly, the court sustains Commerce's determination in all respects.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C98/151 10/7/98 Newman, S.J.	American Aikoku Alpha, Inc.	97-10-01624	8483.10.50 4%	8708.99.50 3.1%	Agreed statement of facts	Chicago Spline shafts
C98/152 10/16/98 Newman, S.J.	Intel Corp.	93-9-00547	8517.82.00 and 8517.90.80 4.7%	8471.99.15 Free of duty	Agreed statement of facts	Portland LAN Boards
C98/153 10/16/98 Newman, S.J.	Intel Corp.	96-6-01556	8517.82.00 and 8517.90.80 4.7%	8471.99.15 Free of duty	Agreed statement of facts	San Francisco, San Juan LAN Boards
C98/154 10/19/98 Carman, S.J.	Ero Industries, Inc.	93-8-00444, 94-4-00222	4202.92.45 20%	3924.10.50 3.4% 6307.90.99 Not stated	Agreed statement of facts	Los Angeles Soft-sided coolers of various sizes
C98/155 10/19/98 Carman, S.J.	SGI, Inc.	93-7-00400	4202.92.45 and 4202.30.30 20%	3924.10.50 3.4% 6307.90.99 7%	Agreed statement of facts	Los Angeles Soft-Sided coolers of various sizes
C98/156 10/20/98 Barzilay, J.	Ohio Bag Corp.	97-1-00058, 97-9-01536	4202.92.4500 20% 4202.30.30 19.8%	3924.90.55 3.4% 6307.90.9989 7%	SGI, Inc. *v.* U.S., 122 F3d 1468 (1997)	New York Plastic insulated cooler bags & nylon insulated cooler bags
C98/157 10/20/98 Tsoucalas, S.J.	Technicolor Videocassettes, Inc.	91-8-00625	3926.90.90 through 3926.90.98 Not stated	8522.90.75 Not stated	Technicolor Videocassette, Inc. *v.* U.S., 19 CIT 942 (1995)	Detroit, Los Angeles V-O VHS cassettes
C98/158 10/21/98 Newman, S.J.	EM Industries, Inc.	95-2-00176	3206.10.00, 3206.11.00 or 3206.19.00 6% 3206.49.20 8.6%, 9.3% or 10% 3206.43.00 3.7% 6814.90.00 5.1%	3206.49.50 3.1%	Agreed statement of facts	New York Pearlescent pigments

ABSTRACTED CLASSIFICATION DECISIONS—Continued

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C98/159 10/21/98 Newman, S.J.	EM Industries, Inc.	95–11–01408	3206.10.00, 3206.11.00 or 3206.19.00 6% 3206.49.20 8.6%, 9.3% or 10% 3206.43.00 3.7% 6814.90.00 5.1%	3206.49.50 3.1%	Agreed statement of facts	Newark Pearlescent pigments
C98/160 10/21/98 Newman, S.J.	EM Industries, Inc.	96–1–00036	3206.10.00, 3206.11.00 or 3206.19.00 6% 3206.49.20 8.6%, 9.3% or 10% 3206.43.00 3.7% 6814.90.00 5.1%	3206.49.50 3.1%	Agreed statement of facts	Newark Pearlescent pigments
C98/161 10/21/98 Newman, S.J.	EM Industries, Inc.	96–4–01096	3206.10.00, 3206.11.00 or 3206.19.00 6% 3206.49.20 8.6%, 9.3% or 10% 3206.43.00 3.7% 6814.90.00 5.1%	3206.49.50 3.1%	Agreed statement of facts	Newark Pearlescent pigments

C98/162 10/21/98 Newman, S.J.	EM Industries, Inc.	97–1–00111	3206.10.00, 3206.11.00 or 3206.19.00 6% 3206.49.20 8.6%, 9.3% or 10% 3206.43.00 3.7% 6814.90.00 5.1%	3206.49.50 3.1%	Agreed statement of facts	Newark, Savannah Pearlescent pigments
C98/163 10/21/98 Newman, S.J.	EM Industries, Inc.	97–5–00908	3206.10.00, 3206.11.00 or 3206.19.00 6% 3206.49.20 8.6%, 9.3% or 10% 3206.43.00 3.7% 6814.90.00 5.1%	3206.49.50 3.1%	Agreed statement of facts	New York, Savannah Pearlescent pigments
C98/164 10/21/98 Newman, S.J.	EM Industries, Inc.	97–9–01510	3206.10.00, 3206.11.00 or 3206.19.00 6% 3206.49.20 8.6%, 9.3% or 10% 3206.43.00 3.7% 6814.90.00 5.1%	3206.49.50 3.1%	Agreed statement of facts	New York, Newark, Savannah Pearlescent pigments
C98/165 10/21/98 Newman, S.J.	EM Industries, Inc.	98–1–00065	3206.10.00, 3206.11.00 or 3206.19.00 6% 3206.49.20 8.6%, 9.3% or 10% 3206.43.00 3.7% 6814.90.00 5.1%	3206.49.50 3.1%	Agreed statement of facts	New York, Savannah Pearlescent pigments

ABSTRACTED CLASSIFICATION DECISIONS—Continued

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C98/166 10/26/98 Newman, S.J.	EM Industries, Inc.	95–4–00439	3206.10.00, 3206.11.00 or 3206.19.00 6% 3206.49.20 8.6%, 9.3% or 10% 3206.43.00 3.7% 6814.90.00 5.1%	3206.49.50 3.1%	Agreed statement of facts	Newark Pearlescent pigments
C98/167 10/26/98 Tsoucalas, S.J.	Titan Media Co.	94–4–00203	3926.90.90 through 3926.90.98 Not stated	8522.90.75 Not stated	Technicolor Videocassette, Inc. *v.* 19 CIT 942 (1995)	Atlanta V–O VHS cassettes
C98/168 10/29/98 Newman, S.J.	EM Industries, Inc.	95–6–00759	3206.10.00, 3206.11.00 or 3206.19.00 6% 3206.49.20 8.6%, 9.3% or 10% 3206.43.00 3.7% 6814.90.90 5%	3206.49.50 3.1%	Agreed statement of facts	Newark Pearlescent pigments
C98/169 10/30/98 Newman, S.J.	EM Industries, Inc.	96–10–02406	3206.10.00, 3206.11.00 or 3206.19.00 6% 3206.49.20 8.6%, 9.3% or 10% 3206.43.00 3.7% 6814.90.00 5%	3206.49.50 3.1%	Agreed statement of facts	Savannah, New York Pearlescent pigments

C98/170 11/5/98 Ridgway, J.	Ero Industries, Inc.	96–3–00889, 96–9–02260, 97–5–00869, 97–9–01507	4202.92.45 and 42022.30.30 20%	3924.110.50 3.4% 6307.90.99 7%	Agreed statement of facts	Los Angeles, Minneapolis, Atlanta Soft-sided coolers
C98/171 11/5/98 Goldberg, J.	Xerox Corp.	93–6–00304	3707.90.30 8.5%	8473.30.40, 9009.90.50 Free of duty 9009.90.70 3.9%	Agreed statement of facts	Buffalo-Niagara Parts and accessories of electro-static photo-copiers & laser printers
C98/172 11/5/98 Goldberg, J.	Xerox Corp.	93–6–00305	3707.90.30 8.5%	8473.30.40, 9009.90.50 Free of duty 9009.90.70 3.9%	Agreed statement of facts	Los Angeles, Dallas-Fort Worth Parts and accessories of electro-static photo-copiers & laser printers
C98/173 11/9/98 Wallach, J.	Petrossian Paris	91–1–00033	4202.92.45 20%	3924.10.50 3.4%	SGI, Inc. *v.* U.S., 122 F3d 1468 (1997)	New York Soft-sided coolers of various sizes

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